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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF
STATE OF IDAHO.

By SOL. HASBROUCK.
(Ex-officio Reporter.)

VOLUME 10.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1906.

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Rec. April 24, 1906

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CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF IDAHO.

(May 11, 1904.)

SMALL v. STATE.

[76 Pac. 765.]

CLAIM AGAINST STATE.

1. Where one holds a claim against the state and does not make application to this court for a recommendatory decision under the provisions of section 10, article 5 of the state constitution, for nine or ten years after the claim becomes due, this court is not authorized to hear the claim and recommend the payment thereof to the legislature. Said claim is barred by the statute of limitations. (Syllabus by the court.)

ORIGINAL application for a recommendatory decision under the provisions of section 10, article 5 of the constitution. Denied.

McFarland & McFarland, for Plaintiff.

Section 4053, Revised Statutes of Idaho, does not apply to this case, because the state cannot be sued, and this is not an action against the state. Wood on Limitations lays down the doctrine that before the statute of limitations begins to run there must be a party to sue and be sued.

John A. Bagley, Attorney General, files no brief.

SULLIVAN, C. J.—This is an application to this court to hear proofs of the plaintiff's claim against the state and for a recommendatory decision under section 10, article 5 of the Idaho, Vol. 10—1

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state constitution. To the petition of the plaintiff the attorney general has demurred on three grounds, to wit: 1. That the petition does not state facts sufficient to constitute a cause of action; 2. That the claim herein presented is barred by the provisions of section 4053 of the Revised Statutes of Idaho; 3. That no reason is given for not presenting this claim to the state until ten years after the lumber was furnished the state out of which this claim arose. The following facts appear from the petition:

That in the years 1892 and 1893 the Small-Colby Lumber Company, of which the plaintiff was a member, furnished James M. Wells, Idaho's Commissioner to the World's Columbia Exposition, lumber and timber of the value of \$5,465.68 for the construction of a state building at Chicago for the state of Idaho. That the said Wells paid \$4,000 upon said account, leaving a balance of \$1,465.68. That said balance has not been paid, and the reason for nonpayment is alleged to be that the bank in which the moneys were deposited for said purpose failed and said funds were lost, and said commissioner had no funds with which to liquidate said claim. It further appears that on the sixth day of January, 1903, the petitioner duly filed with and presented to the state board of examiners of Idaho, for approval, a written statement of said claim duly itemized and verified. That after an examination thereof by said board said claim was disallowed and rejected. Upon that state of facts this court is asked to hear proofs of said claim and recommend to the state legislature that said claim be paid. The demurrer interposed admits all of the facts alleged. The main contention of the attorney general is that this action is barred by the provisions of section 4053 of the Revised Statutes. Said section provides that an action upon a contract, obligation or liability not founded upon an instrument of writing must be brought within four years. It is contended by counsel for respondent that said section does not apply to this case because the state cannot be sued, and that this is not an action against the state. Technically speaking, that contention is true, but this is a claim against the state, and on it this court is only authorized to render a recommendatory decision.

Points decided.

Section 4061 of the Revised Statutes provides as follows: "The limitations prescribed in this title apply to actions brought in the name of the state, or for the benefit of the state, in the same manner as to actions by private parties." It will be observed from the section quoted that the statute of limitations applies to the state as well as to private individuals. Of course the claim under consideration is by a private party against the state and comes within the statute of limitations. The legislature intended the statute of limitations to apply equally to the state as well as to private parties. The claim under consideration arose in 1893, more than ten years ago. As far as the record shows, no effort has been made to collect this claim from the state until it was presented to the state board of examiners in January, 1903, and there are no facts shown to excuse this long delay in presenting or attempting to collect said claim. As the court could not, under the facts presented, recommend that the legislature make provisions for the payment of said claim, it would be useless to hear any evidence in regard thereto. We do not mean to say that the statute of limitations would absolutely prohibit the legislature from making an appropriation to pay said claim if it thought advisable to do so, and simply hold that under the facts presented the plaintiff has slept on his rights for so long a time that this court could not recommend the payment of said claim. It is barred by the statute of limitations. The application is denied and the petition is dismissed.

Stockslager, J., and Ailshie, J., concur.

(May 11, 1904.)

RAUH v. OLIVER.

[77 Pac. 20.]

DEMURRER—REVIEW ON APPEAL—PLEADING—TECHNICALITIES—NONSUIT—JUDGMENT OF DISMISSAL.

1. The action of the court in overruling defendant's demurrer to a complaint cannot be reviewed on an appeal taken by the plaintiff.

Argument for Appellant.

2. Under the provisions of our Code of Civil Procedure, the technicalities of pleading (under the common law) have been dispensed with, and the plaintiff need only state his cause of action in ordinary and concise language, whether it be in *assumpsit*, trespass or ejectment, without regard to the ancient forms of pleading, and the plaintiff can be sent out of court only when upon his facts he is entitled to no relief, either at law or in equity.

3. Under the provisions of subdivision 5 of section 4354 of the Revised Statutes, it is error for the court to grant a nonsuit before the plaintiff has introduced his evidence or offered to do so and rested.

(Syllabus by the court.)

APPEAL from District Court of Idaho County. Honorable Edgar C. Steele, Judge.

Action to recover for services on a mail contract. Judgment for defendant. Reversed.

The facts are stated in the opinion.

James De Haven, Clay McNamee and D. W. Bailey, for Appellant.

The demurrer to the third, fourth and fifth separate defenses should have been sustained. (*Fidelity Nat. Bank of Spokane v. Henley*, 24 Wash. 1, 63 Pac. 1119; *Bradley v. Root*, 5 Paige (N. Y.), 632.) While the testimony of the appellant to the effect that he was employed by the respondent was probably not correct, according to the commonly accepted meaning of the word "employed," it was still within the allegations of the complaint. And even if there had been a variance between the allegations and the proof, that was no ground for a dismissal, as the complaint may be amended to conform to the proof. (Rev. Stats. 1887, sec. 4226; *Murray v. Meade*, 5 Wash. 693, 32 Pac. 780.) On a motion for a nonsuit, the court is bound to give the evidence the most favorable construction for the plaintiff that it will possibly bear. (*Imhoff v. Chicago etc. R. Co.*, 22 Wis. 684; 6 Ency. of Pl. & Pr., p. 943, and notes.) Respondent's contention, which runs all through this case, that money due from United States cannot be assigned, is not true as a matter of law, as applied to the admitted facts in this case.

Argument for Respondent.

(*Hobbs v. McLean*, 117 U. S. 567, 6 Sup. Ct. Rep. 870, 29 L. ed. 940. See, also, *Farmers' Nat. Bank v. Robinson*, 59 Kan. 777, 53 Pac. 762.)

A. S. Hardy and Fogg & Nugent, for Respondent.

The judgment in this case is a judgment of nonsuit, and as appellant failed in proving his own case, the question of the sufficiency of the allegations of these separate defenses is entirely immaterial and cannot be considered on this appeal. The ruling does not affect the judgment. (Rev. Stats. 1887, sec. 4824.) To the effect that the defendant's answer and questions affecting the same cannot be considered on nonsuit, they do not affect the judgment. (*Sayward v. Carlson*, 1 Wash. 29, 23 Pac. 830; *Rensberger v. Britton*, 31 Colo. 79, 71 Pac. 380.) A party should be bound by the allegations of his pleadings, deliberately made, and should not be allowed to obtain benefits from contradictory and inconsistent allegations therein. (*Losch v. Pickett*, 36 Kan. 216, 12 Pac. 822.) The law may recognize the common counts as suggested (and we do not think that under our system even that should have been permitted); but it certainly does not permit any such jumble of causes of action as attempted to be set up here—for labor performed, for money advanced to a third party entirely, for an alleged assignment, etc. (*Buckingham v. Waters*, 14 Cal. 147; *Watson v. Railway Co.*, 41 Cal. 19; *Cosgrove v. Fisk*, 90 Cal. 75, 27 Pac. 56; *Lamb v. Howbaugh*, 105 Cal. 680, 39 Pac. 56 (57).) And the complaint is also ambiguous, and as the point was raised on demurrer, it should not have been permitted to stand. (*Crow v. Hildreth*, 39 Cal. 618.) The only allegations of the complaint which can be construed as alleging a contract of hiring at all are at variance both with the opening statement and with the evidence introduced as well as that offered. These variances are fatal. (*McCord v. Seale*, 56 Cal. 262; *Morrison v. Bradley, Berden & Co.*, 5 Cal. 503; *Cotes v. Campbell*, 3 Cal. 192; *Johnson v. Moss*, 45 Cal. 515.) Appellant's third specification assigns as error the ruling of the court granting a nonsuit. This is the most material assignment to be considered, and the only point in the case. Plaintiff in his complaint at folio 5 alleges

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that the defendant "then and there promised and agreed to pay to said A. G. Smith and to his employee the sum of ———." This promise made to Smith could not be enforced against the defendant by any one of the employees of Smith. (*Chung Kee v. Davidson*, 73 Cal. 522, 15 Pac. 100; *Commercial Nat. Bank v. Portland*, 37 Or. 33, 60 Pac. 563.) If plaintiff's complaint be tested by the theory on which he has elected to try the case and what he states it to be in the opening pages of his brief, it states no cause of action and the nonsuit is proper. (*Richards v. Lake View Land Co.*, 115 Cal. 642, 47 Pac. 683; *Brown v. Lapham*, 22 Colo. 264, 44 Pac. 504; *Posten v. Denver Con. Tram. Co.*, 11 Colo. App. 187, 53 Pac. 391; *Vincent v. City of Pacific Grove*, 102 Cal. 405, 36 Pac. 773.)

SULLIVAN, C. J.—This is an action to recover for carrying United States mail from Mt. Idaho to Florence, Idaho. It is alleged in the complaint that in December, 1898, one Holsclaw entered into a contract with the United States, wherein he contracted to carry the United States mail between Grangeville, Idaho, and Florence, Idaho, as a subcontractor, under what was known as the Underwood mail contract, and that the respondent Oliver was one of said Holsclaw's sureties for the faithful performance of the duties imposed by said contract; that in August, 1899, said Holsclaw failed to comply with the conditions of said contract and ceased to carry said mail on said route, and that the defendant Oliver, as one of the sureties aforesaid, assumed the duties and conditions of said contract and carried said mail from about August 1, 1899, to December 19, 1899; that on or about the last-named date respondent Oliver, as surety, as aforesaid, employed one A. G. Smith to carry said mail and agreed to pay said Smith and his employees for such services the sum of \$2,200 per year, payable quarterly, and to pay the same out of the money received by him from the United States in payment for such services and expenses; that immediately after making said contract and agreement said Smith and plaintiff, relying on said promise, entered upon the duties of said contract and began carrying said mail, and did carry, the same for ninety-two days, and that during said time, and at the request of Smith, this appellant paid for and on account of

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expenses of said mail route the sum of \$175 in order to enable Smith to fill said contract; that said work and labor was reasonably worth, and the said Smith and said Oliver agreed to pay therefor, the sum of \$185, and on the ninth day of April, 1900, said Smith assigned to plaintiff \$360 of the money due on said contract in two written instruments, which instruments are set forth in the complaint; that on or about the tenth day of July the said Oliver received from the United States in payment for carrying said mail on said route, from December 19, 1899, to April 6, 1900, the sum of \$550, and that \$360 thereof was received to and for the use of plaintiff and belonged to plaintiff, and is now due him in payment for services rendered and money paid for expenses as hereinbefore alleged; that on or about the sixth day of April, 1900, and at divers times thereafter, plaintiff demanded payment of said sum from the defendant, and that on or about December 14, 1900, the defendant promised and agreed to pay the same in full; that Smith is now insolvent and has been since September, 1900, and has resided outside of the state of Idaho. Then follows the prayer for judgment against the defendant for the sum of \$300 and costs of the action, and plaintiff waives any further sum due from the defendant. The waiver was made in order to bring the amount sued for within the jurisdiction of the justice's court where this suit was first instituted.

To this complaint the respondent interposed a demurrer on numerous grounds, which demurrer was overruled by the court, and as no appeal was taken from the order overruling the demurrer, the action of the court therein cannot be reviewed on this appeal. It appears from the record that said complaint was the second amended complaint filed in said action. After the overruling of said demurrer the defendant answered, denying generally each and every allegation contained in the complaint and set up four separate defenses. As a second defense the appellant alleges that he received from said Holsclaw on or about July 10, 1900, on account of the mail contract mentioned in plaintiff's complaint, the sum of \$427.50; that he received no other or greater sum; that on or about December 19, 1899, said Smith contracted with the defendant to furnish him with

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hay and grain to be used by him on the mail route mentioned in said complaint, and also hired from defendant horses to be used on said route, and agreed to pay the defendant the reasonable worth and value of said hay and grain as defendant should from time to time furnish him, and also the reasonable use and value of the services of said horses, and that said Smith agreed with defendant that he might and should retain the full value of said hay and grain and said horse hire for any amount that might become due Smith for services upon said mail contract, and deduct the same from any money that might come into the defendant's hands from the United States government from said contract, and it is alleged that under said contract he furnished Smith hay and grain of the value of \$272, and horse hire of the value of \$90, and hack hire of the value of \$155, which hack was furnished said Smith by said Holsclaw, and that said Smith agreed to pay said Holsclaw said sum and authorized the defendant to pay it out of any money received on said mail contract, which sum defendant had paid.

For a third defense defendant sets up the claim of one Schwalbach of \$250 against said Smith, and alleges the assignment thereof to the defendant, and for a fourth defense the defendant sets up an assigned claim of one Pfeufer against said Smith of \$32. For a fifth and separate defense he sets up an assigned claim from one McKee against said Smith for the sum of \$35.60. To the third, fourth and fifth separate defenses plaintiff demurred on the grounds that said defenses did not constitute a defense or counterclaim to the plaintiff's cause of action. Said demurrer was overruled. On the issues thus made a jury was impaneled to try said cause, and before plaintiff had introduced his evidence and rested, on a motion of counsel for respondent a judgment of nonsuit and dismissal was entered. The appeal is from the judgment.

Several errors are assigned on which a reversal of the judgment is asked. The first we will consider is that the court erred in overruling the demurrer to the third, fourth and fifth separate defenses. Those defenses are based on assignments of claims against said Smith, who is not a party to this action, and under the allegations of the complaint cannot be set up as

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a defense against the cause of action stated in the complaint. For that reason the court erred in overruling the said demurrer.

Considerable has been said in the argument of this case as to what kind of an action this is. It is contended that in plaintiff's opening statement to the jury counsel took the position that the action was for money had and received, and that the appellant in his complaint and in his brief has hopelessly jumbled his causes of action and his ideas of the relief he is entitled to and of the grounds and means of securing a relief. While we must admit that the complaint is not one that should be taken as a model, yet we think under the provisions of section 4168, subdivision 2, the complaint is sufficient. Said subdivision provides that the complaint must contain a statement of the facts constituting the cause of action in ordinary and concise language. Section 4020, Revised Statutes, provides that there is but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs. Under the provisions of our code, the technicalities of pleading have been dispensed with and the plaintiff need only state his cause of action in ordinary and concise language, whether it be in *assumpsit*, trespass or ejectment, without regard to the ancient forms of pleading, and the plaintiff can be sent out of court only when upon his facts he is entitled to no relief either at law or in equity. (See note to section 307, Code of Civil Procedure of California; Pomeroy's Remedies, sec. 65 et seq.) We are clearly of the opinion that the complaint states a cause of action.

Counsel assigns as error the action of the court in granting a nonsuit and entering judgment of dismissal. It appears from the transcript that after the jury was impaneled the plaintiff introduced certain evidence. The defendant was sworn on behalf of the plaintiff, and testified, among other things, that he was a bondsman or surety for said Holsclaw, and that the defendant carried the mail something over about two months—November and December, 1899. The appellant was sworn as a witness in his own behalf and testified that he carried said mail; that he was at Oliver's house in Grangeville and had an

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understanding with him in regard to this mail, and that said Smith was present; that the defendant "inquired into about how able they were to carry the mail," whether they could fulfill the contract, and that "Mr. Oliver proved our sayings and proved that we were able to do the carrying of the mail," and that Oliver agreed to pay them \$2,200 per year for carrying the mail, and to pay every three months, and they then went to the postoffice and were sworn in, went on the line, and he agreed that plaintiff should get his pay out of the first quarterly pay, and "that Smith should get his pay and the mail should be carried on and it should be paid the next quarter the same way." At this point in the examination the court suggested that that evidence showed that the contract was made with Oliver and Smith, and that the evidence proved a contract between Oliver and two other persons to carry the mail. Thereupon the witness testified that the defendant employed him to carry this mail on this mail route from Grangeville to Florence, Idaho. Thereupon the court said: "I can't go any farther with this case; no use to proceed." Thereupon the witness was asked the following question: "What did you do, Mr. Rauh, from the 19th of December until the following April 6th on the mail route, if anything?" Mr. Nugent: "We object; that is immaterial and a class of evidence that cannot become material because sought to be based upon a contract which they are not entitled to prove under the allegations of the complaint." The objection was sustained.

Counsel for plaintiff then offered to prove that plaintiff worked on the mail route between Grangeville and Florence, and that A. G. Smith and the defendant agreed to pay him for such work and labor the sum of \$185; that plaintiff paid for and on account of expenses on said route, \$175; that he received vouchers or due-bills from said Smith for that amount aggregating \$360, and that after receiving these due-bills or vouchers the defendant agreed to pay them as soon as he received the pay from the government of the United States for the work performed; that defendant afterward received \$550, and that \$360 of it was due plaintiff by reason of his ninety-two days' labor and \$175 paid out in cash for expenses on the route, and that no part of said sum had been paid, and that when pay-

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ment had been demanded the defendant denied that he had received the \$550, and when shown letters from the United States postoffice department he then admitted that he had received the money and said he would pay plaintiff's claim in full, and offered to prove other matters in connection therewith, to which offer counsel for defendant interposed an objection. The court thereupon said: "There is no way under the complaint you can get this proof in; this is a contract between Smith and Oliver, and this contract now shown is between Rauh, Oliver and Smith. The court will have to pass on this offer; the contract has been proven." Thereupon counsel for the plaintiff offered to prove other facts which it is not necessary to state here. The court thereupon said: "I don't see how you can introduce the testimony; I don't see how the court could try the case upon this complaint for money had and received. In this case a nonsuit will be entered." Exception was thereupon taken by counsel for the plaintiff. Counsel for the respondent then suggested that he would like to have it appear that the plaintiff rested before the order of nonsuit was granted. The court thereupon said: "The court will sustain a motion if you will make it to dismiss the case and take it from the jury." Mr. Nugent, of counsel for defendant, said: "Do I understand the plaintiff has rested?" Counsel for the plaintiff replied: "The plaintiff has not rested." The court: "Have you anything further to offer?" De Haven: "We have, your honor." Mr. Fogg, counsel for defendant, then moved for a nonsuit and dismissal of the action upon the ground that the complaint does not state facts sufficient to constitute a cause of action, and for other reasons, and said motion was sustained by the court and the jury was discharged. Thereafter certain conversation was had between counsel and the court which is not necessary to repeat here as the jury had been discharged.

Section 4354, Revised Statutes, provides in what cases an action may be dismissed or a judgment of nonsuit entered, and is composed of five subdivisions. The dismissal of this case, if made under any of the provisions of said section, was under subdivision 5 thereof, which provides that nonsuit may be entered by the court upon motion of the defendant when upon the trial the plaintiff fails to prove a sufficient case for the jury.

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That motion cannot be entertained by the court until all of the evidence of the plaintiff has been put in or offered and the plaintiff rests his case. We think the evidence introduced and offered by the plaintiff made a *prima facie* case, and the court erred in granting a nonsuit and entering a judgment of dismissal. While we think the court understood that the plaintiff had rested, the record shows that he had not rested his case. Mr. De Haven said that the plaintiff had not rested. The court then said: "Have you anything further to offer?" Mr. De Haven replied, "We have, your honor." Thereupon counsel for defendant moved for a nonsuit and dismissal of the action and the court thereupon granted the motion.

Under the provisions of said section 4352 above referred to, a nonsuit should not be granted until the plaintiff rests his case or fails to prove a sufficient case for the jury and rests.

The court also erred in not permitting the plaintiff to introduce evidence offered, showing what he did on said mail route from December 19th until the following April, and also erred in not permitting the plaintiff to prove that after he had received the due-bills referred to the defendant agreed to pay them as soon as he received the pay from the government of the United States for the work performed, and that he did thereafter receive said pay from the government, and also to show that the \$175 advanced for expenses was spent with the consent and approval of the defendant, and that subsequent to the performance of said services the defendant had agreed to pay the full amount of the money so advanced and for the work performed on said mail route.

For the reasons above given, the judgment must be reversed and set aside and the cause remanded, with instructions to the trial court to sustain the demurrer of the defendant to the third, fourth and fifth defenses set up in the answer, and for further proceedings in harmony with the views expressed in this opinion. The costs of this appeal are awarded to the appellant.

Stockslager, J., concurs.

Ailshie, J., took no part in the decision. Did not sit at the hearing, having been of counsel in the court below.

Argument for Appellant.

(May 12, 1904.)

**KINDALL v. LINCOLN HARDWARE AND IMPLEMENT
COMPANY.**

[76 Pac. 992.]

AMENDMENTS TO PLEADING—NEGLIGENCE.

1. In furtherance of justice, amendments of pleadings should be liberally allowed. *Held*, that the court did not abuse its discretion in refusing to allow an amendment or in refusing to allow the defendant to file a cross-complaint asking affirmative relief under the facts of this case.

(Syllabus by the court.)

APPEAL from District Court of Idaho County. Honorable Edgar C. Steele, Judge.

Application to amend answer and file cross-complaint denied by trial court. **Affirmed.**

I. N. Smith, for Appellant.

The case made, presented for adjudication and determination the rights of the appellant and the respondent to relief each against the other, on the allegations concerning the notes, whose execution was admitted, and concerning which the issue was as to payment. Plaintiff alleged payment; defendant denied it. The court found with the defendant and appellant. The court also found the amount due. Having thus determined the issue, it was his duty to award the judgment according to the respective interests of all the parties. Not having done so, his judgment wherein it fails to award affirmative relief to appellant is erroneous and should be reversed. (Idaho Rev. Stats. 1887, sec. 4351; *First Nat. Bank v. Bews*, 3 Idaho, 486, 31 Pac. 816; *Shields v. Ruddy*, 3 Idaho, 148, 28 Pac. 405; *Benedict v. Horner*, 13 Wis. 256; *Mackinstry v. Smith*, 16 Misc. Rep. 391, 38 N. Y. Supp. 93, 351; *Cythe v. La Fontaine*, 51 Barb. 186.) The court must in every stage of an action disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, etc. (Idaho Rev. Stats. 1887, sec. 4231.) The court may, in furtherance of justice and

Argument for Respondent.

on such terms as may be proper, allow a party to amend any pleading or proceeding or a mistake in any other respect, etc. (Rev. Stats., sec. 4229.) Under the rules of this court, the defendant would not be permitted hereafter to maintain an action on these unpaid notes, by the simple failure to set the same up in this case. As it stands, the same were set up, facts found, but no affirmative relief was granted, because it was not asked, and refusal to amend the prayer of the answer was adjudged, upon application before judgment. When it is recalled that the amendment was asked for by a defendant, the abuse of discretion becomes quite plain. Courts have declared a greater liberality in the exercise of the discretionary amendments in favor of defendants than of plaintiff. In *Tighe v. Pope*, 16 Hun, 181, it is said: "Where a power is granted for the sake of justice, exercise of it may be enforced in a proper case. It is not wholly discretionary." In *Brown v. Bosworth*, 62 Wis. 542, 22 N. W. 521, it is said: "Possibly in view of the consequences which might result from a refusal to amend, a greater liberality should be exercised in allowing amendments to answers than to complaints." (*McAllister v. Clark*, 33 Conn. 253; *Williams v. Cooper*, 1 Hill (N. Y.), 637; *Peter v. Foss*, 16 Cal. 357.) After evidence introduced, defendant is permitted to amend his answer. (*Thorn v. Smith*, 71 Wis. 18, 36 N. W. 707.) The right to refuse an amendment, while possibly discretionary, is not arbitrary. (*Mitchell v. Campbell*, 14 Or. 457, 13 Pac. 190; *Miller v. Perry*, 38 Iowa, 303; *O'Connell v. Cotter*, 44 Iowa, 50; *Gifford v. Mullin*, 9 Ky. Law Rep. 714, 6 S. W. 435 (437); *Grand Island etc. v. Moore*, 40 Neb. 686, 59 N. W. 115; *Carson v. Butt*, 4 Okla. 133, 46 Pac. 596; *Forcy v. Leonard*, 63 Wis. 353, 24 N. W. 78; *Foot v. Sprague*, 13 Kan. 155; *Arrigio v. Catalano*, 7 Misc. Rep. 515, 27 N. Y. Supp. 995 (after verdict); *Cain v. Cody* (Cal.), 29 Pac. 778.)

C. F. McDonald and James De Haven, for Respondent, cite no authorities on the point decided by the court.

A. S. Hardy, for Respondent Stone.

The appellant bases his argument on the theory that as a matter of right he was entitled to amend his answer after judg-

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ment and after the case had been tried, so as to obtain other and further relief than was asked for in the original answer, and other relief than he had attempted to obtain by his foreclosure before the sheriff. When he commenced his foreclosure proceedings before the sheriff by notice, he did not ask that the respondent Stone be held liable in any way, or that any property of Stone's be taken, but elected to hold the respondent Kindall solely for the debt, and by doing so release the joint obligor Stone; and in the affidavit for foreclosure, all the way through reference was made to Kindall only as owing a debt. Under these circumstances Stone would be released from liability, and the fact that Stone was made defendant in the original action instead of plaintiff, and does not appear to have been served with summons and did not appear, and that the appellant herein never sought any affirmative relief against him until after the reversal of the judgment on the former appeal to this court, and then never served this respondent Stone with his notices of motion, or either of them, but only on the respondent Kindall, indicates all the way through the true fact, that respondent Stone was released from liability. We call attention to the further fact that neither in the answer nor in the cross-complaint proposed is there any sufficient showing that the appellant had exhausted his security upon the mortgages set out, and he must make such a showing before he can ask for personal judgment upon the note. (Rev. Stats., sec. 4520; *First National Bank v. Williams*, 2 Idaho, 670, 23 Pac. 552; *Barnes v. Buffalo Pitts Co.*, 6 Idaho, 519, 57 Pac. 267.) We further suggest that the amendment of a pleading under the circumstances of this case is not a matter of absolute right, but in the sound discretion of the court, and that there is no abuse of discretion shown in this case. (*Cheney v. O'Brien*, 69 Cal. 199, 10 Pac. 479; *Garrison v. Goodale*, 23 Or. 307, 31 Pac. 709; *Halleck v. Bresnahan*, 3 Wyo. 73, 2 Pac. 537.)

SULLIVAN, C. J.—This is an appeal from an order denying appellant's motion to amend its answer and to file its cross-complaint and from the judgment. This case was before this court on appeal at its November, 1902, term, and the decision

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on that appeal is reported in 8 Idaho, 664, 70 Pac. 1056. On that appeal the judgment dismissing the action was reversed and the cause remanded for further proceedings. The cause again came on to be heard in the trial court on motion of counsel for plaintiff to have judgment entered in harmony with the opinion of this court, and before the judgment and decree was filed and entered, counsel for the appellant moved to amend the prayer of appellant's answer, whereby it prayed for personal judgment against the plaintiff for the sum of \$335, and interest claimed to be due on certain promissory notes from the plaintiff to the appellant. The motion was denied by the court and judgment entered as directed by this court. Thereafter counsel for appellant moved the court to vacate and set aside said judgment and to grant appellant affirmative relief against the plaintiff Kindall and the defendants, Squires & Stone. At the time said motion was presented for hearing the appellant asked permission to file its cross-complaint in said cause, whereby it set up the \$300 note above referred to and alleged that there were \$200 due on said note with interest, and also an attorney's fee of \$50, and prayed for judgment against said plaintiff and defendants for the sum of \$200 and interest, and \$50 attorney's fee. After hearing said motion the court denied the same. The appeal is from the order denying said motion and from the judgment.

The facts of the case quite fully appear in the opinion in 8 Idaho, and 70 Pac., *supra*, from which it appears that the plaintiff and one Squires & Stone purchased from the appellant a threshing outfit, and afterward, to secure the payment of the purchase price thereof, a mortgage was executed by said Kindall, Stone & Squires. The appellant sought to foreclose said mortgage by notice and sale, and Kindall and his wife procured an injunction to prevent such sale. It was thereafter determined that a part of the property so mortgaged was community property, and that the chattel mortgage was void as to such property, for the reason that the wife of Kindall had not signed the mortgage. In that injunction proceeding the appellant here, did not, by cross-complaint or otherwise, claim any affirmative re-

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lief on the unpaid notes until the amendment to the prayer of plaintiff's answer and the cross-complaint above referred to were presented to the court. The question is presented whether under the foregoing facts the court erred in denying appellant's motion to amend the prayer of his answer or erred in denying appellant's motion to set aside the judgment and to permit said cross-complaint to be filed. It is contended by counsel for appellant that as the indebtedness mentioned in said promissory note or notes arose out of this transaction, that under the rule laid down by this court in *Stevens v. Home Savings & Loan Assn.*, 5 Idaho, 741, 51 Pac. 779, 986, and *Murphy v. Russell*, 8 Idaho, 151, 67 Pac. 427, the appellant had the right to have this whole transaction settled and adjusted between the parties in this suit, and that the court erred in denying appellant's motion to amend and file a cross-complaint. The contention that appellant had the right to ask for affirmative relief in said action is no doubt correct if such relief had been asked for in time and before the case was tried and judgment entered.

It appears from the transcript that the appellant filed no cross-complaint or prayed for any affirmative relief, or sought to do so, until after the case had been tried and decided by the court. It also appears that this case has been pending for some three or four years, and we do not think the court abused its discretion in refusing to permit the appellant to amend the prayer of its complaint or to file a cross-complaint. The motion to amend and to file a cross-complaint was not presented to the court until after the case had been tried, and if after that the court had permitted that to be done, it clearly appears from the record that a retrial of the case would have been necessary. The court finds by its findings of fact that one of the promissory notes referred to had not been paid, to wit, the one for \$300, and also found that there were \$35 due on the \$400 promissory note, with interest on each. The appellant prays in the proposed cross-complaint for judgment in the sum of \$200, with interest at the rate of eight per cent and \$50 attorney's fee. This would indicate that there was not as much

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due the appellant as the court had found was due by its said findings of fact which were made on the twenty-first day of November, 1901, and the proposed cross-complaint was not offered for filing until June, 1903.

Under all the circumstances and facts of this case the trial court did not err in denying the motion referred to. There must be an end to litigation, and as this case was pending for more than three years prior to the action of the court complained of, and if the court had granted the motions referred to, a retrial of the whole case would have been necessary, under those facts the court was fully justified in denying said motions. The judgment of the trial court is affirmed, with costs in favor of the respondent.

Stockslager, J., concurs.

Ailshie, J., took no part in the decision.

(May 17, 1904.)

STATE v. HARNESS.

[76 Pac. 788.]

RAPE—STATEMENT OF COUNTY ATTORNEY TO JURY—ADMISSION OF EVIDENCE—FAILURE OF COURT TO INSTRUCT THE JURY AS TO PRESUMPTION OF INNOCENCE.

1. In the trial of criminal cases the county attorney should not be permitted to use language in his argument to the jury calculated to prejudice their minds against the defendant.

2. Statements made to another party by the person alleged to have been assaulted and raped, and not in the presence of the defendant, are not admissible, unless it be shown that it was so closely interwoven with the transaction that it becomes a part of the *res gestae*.

3. It is a statutory requirement that the court should instruct the jury in writing on all the material issues of the case, if the charge is a felony, but if he fails to do so, in order to predicate error, counsel must request the charge and have the court's refusal to give it, otherwise it is not error.

Argument for Appellant.

4. It is error to refuse to require the husband of the alleged injured party to testify whether he discovered marks or bruises on the person of the wife, when other witnesses had testified to certain marks and bruises.

5. Where one is convicted of the crime of rape and sentenced to a term of fourteen years' imprisonment, and the case is reversed on questions of law and sent back for a new trial, this court will not examine the evidence to ascertain whether the sentence is excessive.

(Syllabus by the court.)

APPEAL from District Court of Nez Perce County. Honorable Edgar C. Steele, Judge.

Defendant was tried and convicted of the crime of rape. From the judgment and order overruling his motion for a new trial he appeals. Judgment reversed.

The facts are stated in the opinion.

George W. Tannahill, for Appellant.

It was competent for the defendant to cross-examine the witness as to her antecedents, character and past conduct, and thus impair her credibility. This line of inquiry became important, because of the contention that the prosecution was prompted by the malice of this witness resulting from a failure to extort money, and more, the circumstances surrounding this case seem to justify a full cross-examination as to her past conduct and character. (*State v. Pepperle*, 36 Kan. 90, 12 Pac. 406; *State v. Probasco*, 46 Kan. 310, 26 Pac. 749; *State v. Wells*, 54 Kan. 151, 37 Pac. 1005; *State v. Park*, 57 Kan. 431, 46 Pac. 713; *State v. Greenburg*, 54 Kan. 161, 53 Pac. 61; *Brandon v. People*, 42 N. Y. 265; *People v. Casey*, 72 N. Y. 393; *Turner v. Territory*, 11 Okla. 660, 69 Pac. 804; *State v. Webb*, 6 Idaho, 428, 55 Pac. 892; *State v. Broadbent*, 27 Mont. 342, 71 Pac. 1; *State v. Abbott*, 65 Kan. 139, 69 Pac. 160; *State v. Collins et al.*, 33 Kan. 77, 5 Pac. 368; *Horgan and Thompson on Self-defense*, p. 468; *Stewart v. Kinkel*, 15 Colo. 539, 25 Pac. 990; *Blenkiron v. State*, 4 Neb. 11, 58 N. W. 587; *State v. Krum*, 32 Kan. 372, 4 Pac. 621.) The court erred in permitting the county attorney to make the fol-

Argument for the State.

lowing statement after the defendant had made his objection and exception: "I repeat it, gentlemen of the jury, any man is justified in taking the law in his own hands under such circumstances." (*State v. Irwin*, 9 Idaho, 35, 71 Pac. 608, 60 L. R. A. 716; *People v. Derbert*, 138 Cal. 467, 71 Pac. 564; *People v. Mitchel*, 62 Cal. 411; *State v. Taylor*, 7 Idaho, 134, 61 Pac. 288; *State v. Anthony*, 6 Idaho, 383, 55 Pac. 884; *People v. Lee Chunch*, 78 Cal. 317, 20 Pac. 719; *State v. Tennison*, 42 Kan. 330, 22 Pac. 429; *Smith v. People*, 8 Colo. 457, 8 Pac. 920; *People v. Ah Len et al.*, 92 Cal. 282, 27 Am. St. Rep. 103, 28 Pac. 286; *Newby v. People*, 28 Colo. 16, 62 Pac. 1035; *People v. Vallier*, 127 Cal. 65, 59 Pac. 295.) In a criminal prosecution, the conversations and statements of third parties not made in defendant's presence or hearing are incompetent. (*People v. Wilmot*, 139 Cal. 103, 72 Pac. 838.)

John A. Bagley, Attorney General, for the State.

In the case at bar the defendant was permitted to cross-examine the witness, Anna Uhri, in regard to these matters, but when he undertook to prove by other witnesses, as part of his case, that the witness, Anna Uhri, had been found in bed with her brother in June, 1902, then the court excluded the testimony. They were trying the case of Harness for rape upon his sister in law and not the case of Anna Uhri for illicit cohabitation with her brother. They have not brought the matter under the rule of impeachment as laid down by our statute or under any other rule of evidence. (Code Civ. Proc., secs. 4490, 4491; *Anthony v. State*, 6 Idaho, 383.) Prosecuting attorney in a criminal case may properly declare to a jury that the evidence convinces him beyond a reasonable doubt that the prisoner is guilty. (2 Ency. of Pl. & Pr. 726, cases cited, note 2.) In *State v. Jefferson*, 43 La. Ann. 995, 10 South. 199, the prosecuting attorney said: "If juries did not convict people who have been so clearly shown to be guilty as this defendant has been, you might as well tear down the courthouse." Held not reversible error. In *Scott v. State*, 7 Lea, 235, the attorney general said to the jury: "If the juries don't punish, the people will rise up and punish it." Held reprehensible,

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but not reversible, error. Matters of common and general information and matters of known and settled history may be referred to in argument by way of illustration or emphasis with entire propriety, though they are not strictly pertinent to the issue. (2 Ency. of Pl. & Pr., cases cited, note 4; *Northington v. State*, 14 Lea, 424; *State v. Phillips*, 117 Mo. 389, 22 S. W. 1079; *State v. Elvins*, 101 Mo. 243, 13 S. W. 937; *Heyl v. State*, 109 Ind. 589, 10 N. E. 916; *Combs v. State*, 75 Ind. 215; *Turner v. State*, 89 Tenn. 547, 15 S. W. 838; *State v. Jefferson*, 43 La. Ann. 995, 10 South. 199.) In prosecutions for rape it may be said to be universally conceded that the state may, on the direct examination of the prosecutrix, prove the fact that she made complaint of the injury, and when and to whom, and she may be corroborated by the persons to whom she complained as to the same fact. (Rice on Criminal Evidence, 826, cases cited.)

STOCKSLAGER, J.—This is an appeal from the district court of Nez Perce county. The county attorney filed an information in said court charging the defendant with the crime of rape, to wit: "On the twelfth day of February, 1903, at the county of Nez Perce, in the state of Idaho, the aforesaid David Harness then and there being committed the crime of rape by then and there feloniously, with force and violence making an assault upon one Rosa Harness, who was not then and there the wife of the said David Harness, and did then and there feloniously ravish and carnally know and accomplish with her, the said Rosa Harness, an act of sexual intercourse by force, violence, and against her will and resistance, contrary to the form of the statute in such case made and provided."

The defendant was tried upon this charge and on the seventh day of November, 1903, found guilty of the crime of rape. On the seventeenth day of November he was sentenced to a term of fourteen years in the state penitentiary. On the twenty-seventh day of February, 1904, an order was made and entered thereafter by the court, overruling defendant's motion for a new trial. On the second day of March, 1904, defendant perfected his appeal from the judgment; also from the order overruling the motion for a new trial.

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Defendant assigns thirty-six errors occurring on the trial and in the order overruling his motion for new trial. Counsel for appellant in his brief discusses assignments 3, 10, 12, 15, 16, 17, 19, 20, 21, 22 and 23 together as one assignment, stating they relate to the same thing and are substantially the same. It is disclosed by the record that William Harness, brother of the defendant, was living with his wife, Rosa Harness, the woman upon whom the alleged assault and offense of rape was committed, in Nez Perce county. It is also shown that Anna Uhri and Frank Uhri, brother and sister of Rosa Harness, made their home with their sister and husband. Prior to moving to the William Harness homestead they had lived upon the homestead of defendant adjoining the homestead of William. Friendly relations had existed between Anna Uhri and defendant, and they were engaged to be married. This engagement seems to have been terminated in May or June, 1902. Defendant and Frank Uhri had been on friendly terms until about the time last indicated. It is shown that the house of William Harness contained two rooms, one above and one below, and that there was a bed in each room. Anna Uhri testified that her sister and husband occupied the lower room and that she occupied the upper room; also her brother Frank slept upstairs.

Counsel for appellant offered to show by Nancy Harness, mother of defendant and William Harness, that about the time the engagement was terminated between defendant and Anna Uhri, that she went to the upstairs room of her son William and found Anna Uhri and her brother Frank in bed together, and she immediately reported her discovery to defendant, who went upstairs and threw Frank out of bed, upbraiding him for his conduct. That Frank came downstairs and was sullen and angry about his treatment from defendant, and that thereafter the relations between Frank Uhri and defendant were unfriendly. Counsel offered to prove the same state of facts by the younger brother, Ed. Harness, who it is shown was present at the time above indicated. Before offering to prove the above state of facts, counsel for appellant stated to the court that the theory of the defense was that there was a conspiracy on

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the part of Frank Uhri, Anna Uhri and Rosa Harness to charge defendant with the crime of rape and send him to the penitentiary. Defendant did not deny that he had been unduly intimate with Rosa Harness on two occasions, but said there was no force or violence used, and that the act of sexual intercourse was entirely voluntary on her part.

Under this statement of facts, should the court have permitted the witnesses to testify as to the past conduct of Anna Uhri and Frank Uhri?

Our attention is called to a recent decision of the supreme court of Kansas. (*State v. Abbott*, 65 Kan. 139, 69 Pac. 160.) "John Abbott was prosecuted upon the charge of rape committed on the person of Desdemonia Horrolson, a girl under eighteen years of age, and he was convicted of an attempt to commit that offense. Mrs. Sadie Stutzman was the mother of the girl and the prosecuting witness. It is claimed that the defendant and Mrs. Stutzman had been unduly intimate for several months prior to the commission of the alleged offense, and that their illicit relations had been brought to the knowledge of her husband; that Mrs. Stutzman met the defendant in the woods near her house in the absence of her husband and demanded money from the defendant, which was not furnished; and that then she began the prosecution against the defendant for the offense against her daughter. She claims to have known of the alleged offense within a few hours after its commission, and it is said she made no complaint for more than a month, nor until the demand for money was refused. It is claimed by defendant that the prosecution was malicious. . . . After she had testified in behalf of the state, she was asked on cross-examination if it was not a fact that from October of the previous year until a few days before demanding the money from the defendant, she had met him in the timber near the house and had illicit relations with him; but the court, on objection of the county attorney, excluded the testimony. . . . It was competent for the defendant to cross-examine the witness as to her antecedents, character and past conduct, and thus impair her credibility. This line of inquiry became important because of the contention that the prosecution was

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prompted by the malice of this witness resulting from a failure to extort money, and some of the circumstances surrounding the case seem to justify a full cross-examination as to her past conduct and character.”

The same court, in *State v. Greenburg*, 54 Kan. 161, 53 Pac. 61, lays down the rule in the syllabus as follows: “For the purpose of proving the character and credit of a witness, he may be cross-examined as to specific facts tending to disgrace or degrade him, although collateral to the main issue, and touching on matters of record. Such an inquiry is only allowed for the purpose of honestly discrediting the witness, and there is reason to believe that it will tend to the ends of justice.” In support of this rule this case cites *State v. Pfefferle*, 36 Kan. 90, 12 Pac. 406; *State v. Probasco*, 46 Kan. 310, 26 Pac. 749; *State v. Wells*, 54 Kan. 161, 37 Pac. 1005; *State v. Park*, 57 Kan. 431, 46 Pac. 713; *Hanoff v. State*, 37 Ohio St. 178, 41 Am. Rep. 496; *Brandon v. People*, 42 N. Y. 265.

The attorney general insists that the witness, Anna Uhri, did not come within the rule laid down in the cases above referred to, and in support of his contention cites sections 6082 and 6083, Revised Statutes of Idaho; also *State v. Anthony*, 6 Idaho, 383, 55 Pac. 884.

Section 6082 says: “A witness may be impeached by the party against whom he was called, by contradictory evidence, or by evidence that his general reputation for truth, honesty or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony.”

Section 6083 provides that: “A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done, the statements must be related to him, with the circumstances of times, places and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them.”

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It will be seen that these sections have no application to the case at bar. There was no attempt to contradict any statement of the witness, or to show that her general reputation for truth and veracity was bad. It had been shown that Anna Uhri was the sister of Rosa Harness and that Frank Uhri was the brother. That Frank Uhri was the complaining witness against the defendant; that an engagement of marriage existed between Anna Uhri and defendant; that such engagement was terminated after it was alleged to have been discovered that Anna Uhri occupied the same bed with her brother Frank; that at the time of such alleged discovery it was claimed defendant went to the bed and ejected Frank therefrom, using violent language and considerable force in doing so; that thereafter Frank and defendant were not on friendly terms. It was shown that the evidence was offered for the purpose of showing the animus and ill-will of witness Anna Uhri toward defendant, and not for the purpose of impeachment, or contradicting any former statements she may have made.

State v. Anthony, cited by the attorney general, has no application. In that case it is said by the court: "An attempt was made to discredit and impeach the defendant, by contradicting him in regard to a particular act that had not the remotest connection with the crime of which the defendant was charged and convicted. An attempt was made to discredit the witness on a matter entirely irrelevant to the issue then being tried. After a careful review of the record and an examination of all the authorities cited, we are of the opinion that the court should have permitted this evidence to go to the jury to aid them in determining whether the prosecution was in good faith, or to gratify a feeling of malice and revenge on the part of the witness, Anna Uhri."

Assignments Nos. 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 and 34 are grouped together and argued as one assignment by counsel for appellant, under the head of misconduct of the county attorney in his argument of the case to the jury and errors of law wherein the court permitted such argument. The county attorney was permitted to say: "Gentlemen of the jury, I say to you now that if you are ever called upon to meet with such

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a circumstance as this, that you take your gun and blow his brains out, and I as a prosecuting officer will never prosecute you for it. If the court orders me to do so, I will resign my office." Again: "Gentlemen of the jury, it is no wonder the people of the south are often provoked to take the law in their own hands in such cases as this. The people in such cases are justified in taking the law in their own hands. It is no wonder they string people up by the neck for such crimes." Again: "Think of this woman there alone with this brute, she calling upon God to help her on one side, and 'God d——n you' on the other!" Again: "Gentlemen of the jury, it is no wonder that the people of the south take the law in their own hands. When such emergency arises, they are justified in taking the law in their own hands. If that brother had done his duty, he would have taken his gun and went down to defendant's home and blown his brains out, . . . and if he had done that, I, as prosecuting officer, would never have prosecuted him for it. . . . I repeat it, gentlemen of the jury, any man is justified in taking the law in his own hands under such circumstances."

It is shown by the record that counsel for defendant objected to each and all of these statements, which objections were overruled by the court with the statement that "It is a conclusion drawn by the attorney from the evidence. You should not interrupt the county attorney in his argument; the court will allow you an exception to all remarks prejudicial to the defendant at the conclusion of the trial, or in case you propose a statement."

It is clear to us from the argument of the county attorney that he was filled with enthusiasm and unquestionably made statements that ordinarily he would not make, being the prosecuting officer of his county. We do not believe he would advise or encourage mob violence; under any conditions such advice would be dangerous to the peace and good order of the state. His oath of office as the prosecuting officer of Nez Perce county requires him, among other things, to prosecute all persons charged with violating any of the laws of the state within his jurisdiction, and he, as such prosecuting officer, could not justify his remarks to the jury. It is immaterial what prompted

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him to the use of such language; there is no excuse for it, and its effect could only tend toward prejudicing the jury against the defendant. The fact that the defendant was charged with one of the most revolting crimes known to humanity does not close the doors of the courts to him. He is entitled to a fair and impartial trial by an unbiased and unprejudiced jury, and it was and is the duty of the court, aided by the prosecuting officer, to surround him with the safeguards of the law. All men are presumed to be innocent until the contrary is shown, and this presumption shields the humblest as well as the most depraved citizen when charged with crime.

The court erred in the statement that "It is a conclusion drawn by the attorney from the evidence. You should not interrupt the county attorney in his arguments. The court will grant you an exception to all remarks prejudicial to the defendant at the conclusion of the trial." It was the only time counsel for the defendant could protect his client from the danger of the statements of the prosecuting officer. The injury, if any, was in allowing the remarks to go to the jury. After the close of the trial it would only be effectual in this court, unless the court meant to convey the idea to counsel for defendant that after the close of the argument he would call the attention of the jury to the remarks of the county attorney and instruct them that in their deliberations they must not be influenced by such remarks. The record does not disclose that such was done, hence we infer that they went unchallenged so far as the jury was concerned.

Can it be said that the statements of the county attorney that men charged with or guilty of the crime for which defendant was upon trial should be strung up by the neck, or have their brains blown out; that he would blow his brains out under similar circumstances, and if the husband had done his duty he would have taken his gun and blown his brains out; that he as a peace officer of the county would not prosecute one for such an offense—had no weight with the jury? We think not. In a very recent decision of this court in *State v. Irwin*, reported in 9 Idaho, 35, 71 Pac. 608, 60 L. R. A. 716, the defendant was convicted of the crime of rape. In speaking of the duty of

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the prosecuting officer in the trial of criminal cases, the syllabus says: "It is the duty of the prosecutor to see that a defendant has a fair trial, and that nothing but competent evidence is submitted to the jury; and above all things he should guard against anything that would prejudice the minds of the jurors and tend to hinder them from considering only the evidence introduced. He should never seek by any artifice to warp the minds of the jurors by inference and insinuations." Many authorities are cited and discussed in support of this rule by Mr. Justice Ailshie, who wrote the above opinion. We do not deem it necessary to cite further authorities on the question. It is sufficient to say that none can be found that would uphold a judgment under the conditions shown by the record in this case.

The attorney general cites 2 Encyclopedia of Pleading and Practice, 726. This language is used: "Prosecuting attorneys in a criminal case may properly declare to a jury that the evidence convinces him beyond a reasonable doubt that the prisoner is guilty." There was certainly nothing objectionable to this statement.

In *State v. Jefferson*, 43 La. Ann. 995, 10 South. 199, the prosecuting attorney said: "If juries did not convict people who have been so clearly shown to be guilty as this defendant has been, you might as well tear down the courthouse." This again was only his conclusion of what the evidence established.

In *Scott v. State*, 7 Lea, 233, the attorney general said to the jury: "If juries don't punish crime, the people will rise up, and should rise up and punish it." This was held reprehensible, but not reversible, error. No promises here that if the people will take the law into their own hands they shall have immunity from the prosecuting officer of the county or state.

We have examined all the other authorities cited by the attorney general and find that they do not apply to the case under consideration.

The third error complained of relates to the failure of the court to instruct the jury on its own motion that "the defendant was presumed to be innocent until he was proven guilty."

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The statute makes it the duty of the court to instruct the jury on all material issues, and it was undoubtedly an oversight on the part of the court that this instruction was not given.

Assignment No. 4 is based upon the severity of the sentence imposed upon the defendant to fourteen years' imprisonment, counsel for the appellant insisting that the evidence in the case does not warrant severe punishment. We express no opinion on this assignment.

Assignment No. 11 relates to a question asked William Harness, the husband of Rosa Harness, to wit: "Did you see any marks or bruises on her body?" This question was objected to by the county attorney and the objection sustained by the court. This was error, as other witnesses had testified to seeing marks and bruises on her person, and counsel for appellant had the right to interrogate the husband while upon the stand relative to such marks and bruises.

We find no error in the ruling of the court set out in assignment No. 2. The question was propounded to Rosa Harness, to wit: "You didn't discover you had been raped until the next day, did you?" It would seem that this question was more for the purpose of humiliating the witness than to elicit the facts in the case, and an objection to it was properly sustained.

Assignment No. 4 is based on the cross-examination of Rosa Harness relative to certain changes that had been made in her evidence before the committing magistrate. It was shown that the changes were not made in the presence of defendant. The question was: "This question you did not change, did you? You talked this all over with the county attorney? Didn't you answer, 'Yes, sir'? You didn't change that question, did you?" The county attorney objected to this question, which was sustained by the court. This ruling was error.

Assignment No. 35 is based upon a question to witness, Anna Uhri, to wit: "And what else did she say? Anything else besides?" Counsel for appellant objected to this question, which was overruled by the court, and the witness answered detailing the conversation between herself and sister. This was error.

On this subject Mr. Underhill, in his very excellent work on Criminal Evidence, section 409, says: "The fact that the

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victim of a rape was weeping, or that she made immediate complaint, as well as when she made it, and to whom, being material and relevant to show the commission of the crime, may be proved as original evidence on the direct examination of the prosecutrix, or of any other witness. It may be shown that the complaint was made and that some person was accused who must not be named. But the details of what the prosecutrix said cannot be proved on the direct examination, unless the complaint is so clearly connected with the time or place of the crime as to form a part of the *res gestae*."

A long list of cases are cited in support of this rule by Mr. Underhill in support of this text. *People v. Wilmot*, 139 Cal. 103, 72 Pac. 838, *People v. Warren*, 134 Cal. 202, 66 Pac. 212, hold to the same rule.

The judgment and order overruling defendant's motion for a new trial must be reversed and new trial ordered.

Sullivan, C. J., and Ailshie, J., concur.

(May 20, 1904.)

FORD v. WASHINGTON NATIONAL BUILDING AND
LOAN INVESTMENT ASSOCIATION.

[76 Pac. 1010.]

PLEA OF USURY—OPTION TO PAY BEFORE MATURITY—ESTOPPEL.

1. A contract whereby a loan is to be paid in a fixed number of monthly installments of \$13 interest and \$9.75 principal, and the aggregate amount of interest to be thus paid falls within the terms of the usury statute (Rev. Stats., sec. 1226), will not be relieved from the operation of such statute by reason of the fact that the contract reserves to the borrower an option to pay the entire debt at any time, and the earliest interest installments, prior to a reduction of the principal, fall within the legal rate of interest which may be charged.

2. In such case the subject of inquiry is whether or not the contract provides, either directly or indirectly, for the payment of a greater rate of interest than authorized by law.

Argument for Appellant.

3. The defense of usury may be pleaded by anyone claiming under and in privy with the borrower.

4. The doctrine of estoppel may not be invoked to defeat the plea of usury when interposed by any person otherwise legally entitled to interpose such plea.

5. *Anderson v. Oregon Mtg. Co.*, 8 Idaho, 418, 69 Pac. 130, distinguished and held not decisive of the questions raised in this case.

(Syllabus by the court.)

APPEAL from District Court in and for the County of Latah. Honorable Edgar C. Steele, Judge.

From a judgment in favor of the plaintiff ordering the cancellation of a mortgage, defendant appeals. Affirmed.

The facts are stated in the opinion.

Forney & Moore, for Appellant.

Assignments of error: 1. The trial court erred in adjudging the contract usurious—the principle announced by this court in *Anderson et al. v. Oregon Mtg. Co.*, 8 Idaho, 418, 69 Pac. 130, being applicable; 2. The contract herein differs from those in the cases of *Association v. Shea*, 6 Idaho, 405, 55 Pac. 1022; *Trust Co. v. Hoffman*, 5 Idaho, 376, 95 Am. St. Rep. 86, 49 Pac. 314, 37 L. R. A. 509, in that the debt could be paid at any time by the borrower, with interest at twelve per cent per annum and no more; 3. The evidence proved an estoppel upon the plaintiff's claim of usury under appellant's second defense; 4. On no theory has appellant received back his principal. (*Frost v. Pacific Savings Co.*, 42 Or. 44, 70 Pac. 814; *Irwin v. Washington Nat. Bldg. etc. Assn.*, 42 Or. 105, 71 Pac. 143.) The right to have money paid as usurious interest applied on the principal, or to recover the surplus, if any, after lawful interest has been paid, is a matter personal to the party making the payment and those in privy with him, which he may insist upon or waive, at his pleasure, and of which his grantee cannot take advantage. (Thompson on Building and Loan Associations, secs. 260, 522; Tyler on Usury, c. 31, p. 417; *Bensley v. Homier*, 42 Wis. 635; *Ready v. Huebner*, 46 Wis. 692, 32 Am. Rep. 749, 1 N. W. 344; *Warwick v. Dawes*, 26 N. J. Eq. 548; *Reading v. Weston*, 7 Conn. 409.)

No appearance on behalf of the respondent.

AILSHIE, J.—This action was commenced by the plaintiff for the cancellation of a mortgage appearing of record against certain of her real estate in the city of Moscow. The defendant answered denying, among other things, the payment of the mortgage debt, and set forth the mortgage and alleged a balance due thereon praying judgment of foreclosure. The case was tried before the judge without a jury and judgment was entered in favor of the plaintiff. The defendant settled a statement and bill of exceptions and thereupon appealed from the judgment.

The questions presented by this appeal for our consideration are set forth in the following assignments of error: "1. The trial court erred in adjudging the contract usurious—the principle announced by this court in *Anderson et al. v. Oregon Mtg. Co.*, 8 Idaho, 418, 69 Pac. 130; being applicable; 2. The contract herein differs from those in the cases of *Fidelity Sav. Association et al. v. Shea*, 6 Idaho, 405, 55 Pac. 1022; *Vermont Loan etc. Co. v. Hoffman*, 5 Idaho, 376, 95 Am. St. Rep. 86, 49 Pac. 314, 37 L. R. A. 509, in that the debt could be paid at any time by the borrower, with interest at twelve per cent per annum and no more; 3. The evidence proved an estoppel upon the plaintiff's claim of usury upon appellant's second defense; 4. On no theory appellant received back his principal."

As suggested by the second assignment, the only material or essential difference between the facts upon which this case rests and those in *Fidelity Sav. Assn. v. Shea*, 6 Idaho, 405, 55 Pac. 1022, and *Stevens v. Home Savings etc. Assn.*, 5 Idaho, 741, 51 Pac. 779, is that in this case the borrower might at any time "or on before" seven years from the date of the contract pay off the entire debt by paying the annual interest of six per cent and annual premium of six per cent.

On the eighteenth day of May, 1893, Honorable W. C. Piper, then judge of the second judicial district of this state, made a written application to the Washington National Building and Loan Investment Association (a corporation), appellant herein, for a loan of \$1,300, offering as security therefor a first mortgage on his residence property in the city of Moscow. At the time of making this application, Judge Piper was not a

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member of the association, and under the by-laws of the corporation it seems that loans could not be made to anyone but members who had their dues paid up on their stock for at least six months. After going through with the regular routine, usually required by such companies, the mortgage was executed of date October 16, 1893, and was acknowledged on the eighteenth day of the same month. November 3, 1893, the association issued a check for \$1,195 to "the Wash. Nat. Bank, account William C. Piper," which it had been agreed should be used to pay off a pre-existing mortgage indebtedness upon the same property on which the subsequent mortgage was given. Another check for the balance of \$105 was issued to "William C. Piper or bearer," but was never delivered to the mortgagor, but was turned into the association for the ostensible purpose of paying the following items to the company: Membership fee, \$16; attorney fee, \$10; application, \$13; cancellation fee, \$7.50, and \$58.50 for six installments on the stock, covering the six months' installments immediately preceding the loan as required by the by-laws. The actual sum, then, received on this loan was \$1,195. By the terms of the contract Piper was to pay a fixed sum of \$13 per month as interest and a monthly installment of \$9.75 on the principal or stock, as it was termed by the contract. While the principal would be constantly diminishing, the interest payments would still remain fixed, and although starting out at a rate of about 12.56 per cent, by the end of seven years would exceed thirty-six per cent. It is true that if the debtor had paid the debt at such a time prior to the reduction of the principal that the monthly interest paid would not have raised the rate above eighteen per cent per annum, as allowed by law at the time of execution of the contract (Rev. Stats., sec. 1264), then no usury would ever have been collected or payable. But this was not done. This contract did not mature in full within that period of time, but only to the extent of the monthly principal and interest installments. It cannot be presumed that the contract was executed with any view to payment in any other manner or at any different time than that stipulated therein. The contract shows on its face the intent of the parties thereto. That intent was to charge

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and collect under devious and specious pretexts what amounted to a higher rate of interest than that allowed by law. A contract of this kind granting an option to pay before maturity and where the interest grows into a usurious rate before such maturity is a usurious contract, and does not fall within the rule announced by the courts permitting a higher rate by way of a penalty after maturity where the debt is not paid at maturity. The test of usury, fixed by our statute (section 1266), is not what might have happened under possible contingencies, but rather, that if "a rate of interest has been contracted for greater than is authorized" by law it is usurious and must be so treated by the courts. The subject of inquiry in such cases is whether or not a contract has been made whereby, either directly or indirectly, a greater rate may be charged than that authorized by law. (*Vermont Loan etc. Co. v. Hoffman*, 5 Idaho, 376, 95 Am. St. Rep. 186, 49 Pac. 314, 37 L. R. A. 509; *Stevens v. Home Saving etc. Assn.*, *supra*; *Fidelity Savings Assn. v. Shea*, *supra*.)

Does this fall within the rule announced in *Anderson v. Oregon Mtg. Co.*, 8 Idaho, 418, 69 Pac. 130? I would answer this in the negative. There may be expressions in that opinion which would look to the conclusion reached by the appellant here, but as I read that case, the only question material to its determination was whether or not the purchaser of the mortgaged premises who retained sufficient out of the purchase price of the land to cover the debt and agreed to pay the mortgage could be heard to say that the debt he thus agreed to pay was usurious. A majority of this court said he could not. That seems to me the utmost extent to which that case goes.

The last installment paid under this contract was in April, 1898, and on July 6, 1899, the mortgagor conveyed the mortgaged premises to Adele T. Piper, his wife. This deed contained full covenants of warranty, and among its covenants is the following: "That the same are free and clear of all former or other grants, bargains, sales, liens, taxes, assessments and encumbrances of whatever kind or nature soever, except taxes for year 1899; and that the above bargained premises in the quiet and peaceable possession of the said party of the second

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part, her heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part shall and will warrant and forever defend.”

On the fifth day of October, 1899, Adele T. Piper, by deed containing like covenants and warranty, conveyed the premises to the plaintiff, Adele T. Ford. It is not contended by the appellant that either the purchaser, Adele T. Piper, or the plaintiff ever assumed or promised or agreed to pay the mortgage debt.

In this case the respondent is the purchaser of the entire legal and equitable estate of the mortgagor in and to the mortgaged premises, and is privy in estate with the original grantor. She has neither assumed nor agreed to pay the mortgage debt, neither does it appear that any sum whatever was retained by her from the purchase price of the land for the benefit of the mortgagee or for application upon the mortgage debt. The principal sum borrowed by her grantor having been repaid by him prior to conveyance, it would be reasonable and fair to assume that she took this property with notice of the usurious character of the contract and with knowledge that under the usury statute the debt was paid and liquidated, and that there was no further obligation thereunder chargeable against the estate. It seems to me that the defense of usury may be pleaded by anyone claiming under and in privity with the borrower. This view seems to have been taken by some very respectable authorities. (*Thompson on Building and Loan Associations*, p. 522; *Brolasky v. Miller*, 9 N. J. Eq. 807; *Lyon v. Welsh*, 20 Iowa, 579; *Tyler on Usury*, p. 406.)

We next come to the contention of appellant that the respondent and her grantors were estopped from raising the issue of usury in this case. The substance of appellant's contention under this assignment is that, since the loan association was so organized as to permit of the subscribers for stock paying up at any time they might desire to withdraw from the association, and at the same time receive a share of the net profits earned, numerous members might withdraw and receive their share of usurious interest collected under these contracts,

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and thereafter this defense be interposed by other members and thereby diminish the proceeds to be received by the remaining members, and work an inequitable and unjust discrimination between the withdrawing members and those who remain in the association. Our answer to this position is that the members of the association are presumed to know the law, and thus knowing that all such contracts as the one entered into in this case, executed to be enforced against real estate in Idaho, are usurious, and that if they so divide their unlawfully gotten profits as to enable one member to obtain an advantage over another, they cannot resort to a court of equity to give them relief. When declaring dividends out of such usurious receipts, they must have known that every such contract for the enforcement of which they might be compelled to resort to the courts would be open to attack for its illegal provisions. To allow the purposes and objects of the usury statutes to be thwarted and the law evaded by a corporate plan so unique would be an acknowledgment of the inability of the courts to look through a veneer of words and find the real object and purpose sought. It seems to me that the doctrine of estoppel which prevents a party to a contract coming into court and seeking to have the court place a different construction upon his contract from that which he has placed upon it by his continuous actions and conduct, and thereby prejudice the rights of the other contracting party, should not be applied to prevent the enforcement of the usury statute. The state has an interest in the enforcement of this statute, in that it receives the benefits of the penalty, and the statute therefore becomes more than a law protecting the necessitous borrower.

Respondent has aptly expressed this view of section 1266, Revised Statutes, as follows: "Section 1266, Revised Statutes, provides that the court shall impose the penalty prescribed for usury 'if it is ascertained in any suit, brought on that contract,' that a rate of interest greater than that authorized by the statute is contracted for, 'directly or indirectly.' Under this statute usury is not a defense which a party may, or may not, invoke by pleading it. The duty of enforcing the prohibition is imposed upon the court regardless of the plea by the

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party; and the statute is a solemn declaration of the public policy of the state. A party cannot, therefore, estop himself from asserting this defense."

This position is substantially sustained by *Stevens v. Home Bldg. etc. Assn.*, *supra*; *Fidelity Bldg. Assn. v. Shea*, *supra*; *Vermont Loan etc. Co. v. Hoffman*, *supra*. On estoppel, see *Cade v. Larned*, 109 Ga. 292, 34 S. E. 566; *Buquo v. Bank of Erin* (Tenn. Ch. App.), 52 S. W. 775; *Miles v. Kelly* (Tex. Civ. App.), 25 S. W. 724; *Reed v. Johnson*, 27 Wash. 56, 67 Pac. 381, 57 L. R. A. 404.

Appellant urges that the judgment should be reversed, for the reason that the court erred in finding that the principal sum received by Piper had been fully paid. According to the figures presented by appellant's brief, there is a balance of \$46.80 due the association, and according to respondent's figures there would be a balance of \$23.30 which respondent practically admits would still be due. This misunderstanding on the part of the court has evidently arisen from the variance between the allegations of defendant's answer and his proofs. In paragraph 7 of the defendant's "further, separate and second defense," it is alleged "that during this period the payments made on account of the Piper loan have been the sum of \$689, and no more, and the payments on said stock, together with the dividends, aggregating the sum of \$590.50, and no more." The same allegation as to payment of \$689 interest and premium is found in paragraph 4 of defendant's "further, separate and third defense."

Mr. Vials, who was the association's manager during the period covered by this transaction, testified upon the trial concerning the amount paid as follows: "The total amount of installments paid on this building and stock loan amounted to \$565.50. The total amount paid in, interest and premium on the loan, \$687.70, making the total amount paid in, \$1,253.20." The confusion evidently arose by reason of the defendant figuring all the while that the loan was \$1,300, and the first \$58.50 deducted for six installments was a payment on the loan, while the plaintiff proceeded on the theory that the loan was only \$1,240.50, and that the \$58.50 was never received by the bor-

Points decided.

rower. It seems that this confusion is more the fault of appellant than of respondent, and if the apparent discrepancy had been seasonably brought to the attention of the trial court it would undoubtedly have been corrected.

We cannot reverse the judgment on this account alone. We shall, however, decline to award respondent any costs, and that will fully compensate the appellant for all it would have been entitled to recover upon any basis of figuring which has been presented to us.

Judgment affirmed. No costs awarded.

Sullivan, C. J., and Stockslager, J., concur.

(May 21, 1904.)

BOISE IRRIGATION AND LAND COMPANY v.
STEWART, JUDGE.

[77 Pac. 25, 321.]

CONSTITUTIONAL LAW—TITLE TO ACT—PUBLIC WATERS—REGULATION OF APPROPRIATION—OWNERSHIP IN WATER—LOCAL AND SPECIAL LAWS—STATE ENGINEER—HOW PAID—COSTS OF MAPS AND PLATS—JUDGE MAY REQUEST STATE ENGINEER TO FURNISH MAPS AND PLATS—DISCRETIONARY—REGULATING PROCEDURE—NO PERSON HAS VESTED RIGHT IN PROCEDURE—RETROSPECTIVE LAW—EVIDENCE IN WATER SUIT—APPOINTMENT OF REFEREE TO TAKE TESTIMONY.

1. The title to an act entitled "An act to regulate the appropriation and diversion of the public waters and to establish rights to the use of said waters and the priority of such rights," approved March 11, 1903 (Sess. Laws 1903, p. 223), held sufficient to include all of the provisions of said act particularly referred to in this proceeding and not repugnant to the provisions of section 16, article 3 of the constitution of Idaho.

2. The term "public waters" as used in said act refers to all water running in the natural channel of the streams, and the state may by proper legislation regulate the appropriation and use thereof.

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3. The private rights to the use of such waters are rights to use the same, and not an ownership of them while they are flowing in the natural channel of the streams.

4. The title of said act is sufficient to include provisions for the appropriation of such waters and the settlement of the priorities of rights to the use thereof.

5. The provisions of sections 4 and 5 of said act are not repugnant to the provisions of section 2 of article 5 of the state constitution.

6. Said act is not a local or special law within the meaning of subdivision 3 of section 19 of the state constitution, and is not repugnant to sections 2 and 26 of article 5 of the constitution.

7. The work required to be done by the state engineer under the provisions of section 33 of said act must be paid for by the state, and that done under the provisions of section 37 must be paid for by parties to the action.

8. In an action to determine the rights and priorities to the use of water when the defendants file cross-complaints and ask for affirmative relief, the awarding of costs is in the sound discretion of the court.

9. Under the provisions of said section 37 the state engineer is only entitled to recover his actual and necessary costs for the work performed by him, and any party to the action may contest his right to recover the amount claimed by him and the court should only allow his actual and necessary costs.

10. That provision of said section which provides that the "judge of such court shall request the state engineer to make, etc.," is directory and not mandatory, and that matter is left in the sound legal discretion of the judge.

11. The state has the right to prescribe reasonable rules and regulations, whereby the rights and priorities of appropriators to the use of water may be settled and to require them to pay the necessary costs incurred therein.

12. If it is shown that such maps and plats are incorrect in any material particular as to the rights of any of the parties to the suit, the state engineer is not entitled to recover such party's *pro rata* share of the cost of preparing the same.

13. No person has a vested right in any particular mode of procedure for the enforcement or defense of his rights, and if before trial of a cause a new law as to procedure is enacted and goes into effect, it will from that time govern and regulate the proceedings, unless the statute provides to the contrary.

14. The legislature has authority to provide by statute that the statements, maps and plats referred to in section 37 of said act should be accepted as evidence on the trial of actions to establish rights to the use of water and the priority of such rights.

Argument for Plaintiff.

15. The law of evidence is a part of the remedy and is within legislative control.

16. Under the provisions of section 4493, Annotated Code of Civil Procedure (Sess. Laws 1901, p. 132), the court or judge has authority to appoint a referee to take the testimony in the action where the parties are numerous and the convenience of the witnesses and the ends of justice would be promoted thereby.

ORIGINAL proceeding in the supreme court for a writ of prohibition. Writ denied.

The facts are stated in the opinion.

Wood & Wilson and Hawley, Puckett & Hawley, for Plaintiff.

This case is already practically decided by the case of *Bear Lake County v. Budge*, 9 Idaho, 703, 75 Pac. 615. By that decision, sections 34, 35 and 36 of the act in question were declared void. It is hardly probable that the legislature would have enacted a series of unconstitutional sections contained in that act without the enactment of sections 34, 35 and 36, which have been held void. If the last proposition is true the whole act must necessarily fall with the sections already declared unconstitutional. (*Ballentine v. Willey*, 3 Idaho, 496, 95 Am. St. Rep. 17, 31 Pac. 994.) The authorities all hold that while it is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, those parts held constitutional must be wholly independent of the parts declared to be unconstitutional. But "if they are so mutually connected with and dependent upon each other as conditions, considerations or compensations for each other as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected must fall with them." (*Warren v. Charlestown*, 2 Gray, 84.) Again, the statute in question has no application to the case at bar, because unless the contrary manifestly appears, all statutes act prospectively only. This suit was commenced many months before the enactment of the statute, and it is fair to assume that the parties thereto

Argument for Plaintiff.

commenced preparations for their cases and the accumulation of evidence under the statutes existing when the suit was commenced. Statutes are to be considered prospective unless the language is such as to show that they were intended to be retrospective. (*Ellis v. Connecticut Mut. Life Ins. Co.*, 8 Fed. 83, 19 Blatchf. 383, and authorities cited; 44 American Digest, Century ed., col. 2923; *State ex rel. Parker v. Thompson*, 41 Mo. 25; *Garrett v. Doe*, 2 Ill. (1 Scam.) 335, 30 Am. Dec. 653; *Grinder v. Nelson*, 9 Gill, 229, 52 Am. Dec. 694; *Auditor General v. Chandler*, 108 Mich. 569, 66 N. W. 482; *Trist v. Cabenas*, 18 Abb. Pr. 143; *Merwin v. Ballard*, 66 N. C. 298; *Chew Heong v. United States*, 112 U. S. 536, 5 Sup. Ct. Rep. 255, 28 L. ed. 770.) The petitioner in this proceeding has one of the oldest and most extensively developed canal systems in southwestern Idaho. Its maps, its surveys and its records are ample and complete, and it was prepared to proceed to trial without the assistance of the executive branch of the state government, and without being required to have its property taken for the costs of a similar survey. This provision of the statute alone, providing for the taxation of these surveys as costs, is a taking of property without due process of law. It compels the petitioner here to submit to an excessive judgment for costs incurred in securing evidence against itself, over which it has no control, not even the privilege of verification of the information contained in the surveys, examinations and maps, by cross-examination of the parties making surveys and collecting the information sought to be used as evidence. In *Cullen et al. v. Glendora Water Co.*, 113 Cal. 503, 39 Pac. 769, the supreme court of California passed upon the question in that particular case as to what was special legislation within the inhibition of the California constitution, article 4, paragraph 25, similar to our own. Section 37, which is the important section attacked in this action, refers to maps, etc., to be used in the determination of private as well as public rights, and section 41 expressly declares that, after the passage of the act, all the waters of the state are to be controlled and administered in the manner therein provided. The act is unconstitutional because sections 4 and 5 thereof, and upon which the entire act rests, contravene

Argument for Defendant.

section 2 of article 5 of the constitution, in that it vests in the state engineer power which is judicial in its character. (17 Am. & Eng. Ency. of Law, 586, 587, and notes; *State v. Gerry*, 68 N. H. 495, 38 Atl. 272, 38 L. R. A. 228; *Thorp v. Freed*, 1 Mont. 657.) The act is unconstitutional for the reason that it is antagonistic to subdivision 3 of section 19 of article 3, and of section 2 of article 5 of the constitution of Idaho.

Rice & Thompson, Richards & Haga, Frank Smith and Wyman & Wyman, for Defendant.

The ultimate questions to be determined are: 1. Did the district court exceed its jurisdiction in making the order set forth in the affidavit requesting the state engineer to make an examination and report thereon? 2. Did the district court exceed its jurisdiction in making the order set forth in the affidavit, appointing N. M. Ruick referee and master? The writ is always refused where it appears that the court has jurisdiction over the matter complained of. (16 Ency. of Pl. & Pr. 1125.) The writ will not be granted where a greater injustice will be done by its issuance than would be prevented by its operation. (23 Am. & Eng. Ency. of Law, 213.) Writ will be refused where parties cannot be placed *in statu quo*. (*Whatley v. Franklin County*, 1 Met. (Mass.) 336.) Remedial statutes may apply to past transactions and pending cases. No person can claim a vested right in any particular mode or procedure for the enforcement or defense of his rights. Where a new statute deals with procedure only, *prima facie* it applies to all actions, those which have accrued or are pending, and future actions. If before final decision a new law as to procedure is enacted and goes into effect, it must from that time govern and regulate the proceedings. (Sutherland on Statutory Construction, sec. 482.) The same rule applies to costs. At any time during the pendency of the suit, and before the right to costs has become vested, the legislature may change the law previously in force, either by totally repealing it or by modification only, or, in the absence of any law, it may enact one. (5 Ency. of Pl. & Pr. 113.) What is a special and what is a general law? The state contains a great variety of subjects of legislation, each re-

Argument for Defendant.

quiring provisions peculiar to itself. Generic subjects may be divided and subdivided into as many classes as require this peculiar legislation. Nearly every matter of public concern is divisible, and division is necessary to methodical legislation. A statute relating to persons or things as a class is a general law; one relating to particular person or things of a class is special. (Sutherland on Statutory Construction, sec. 121.) The term "general" is used as contradistinguished from special, and then it means relating to all of a class, instead of to one or a part of that class. (26 Am. & Eng. Ency. of Law, 532.) And as to uniformity of operation, the section of the constitution which provides that "all laws of a general nature shall have a uniform operation" means that every law shall have a uniform operation upon all the citizens or persons or things of any class upon which it purports to take effect, and that it shall not grant to any citizen or class of citizens privileges which, upon the same terms, shall not equally belong to all citizens. (*Brooks v. Hyde*, 37 Cal. 366.) With reference to the objection that the law deprives persons of property without due process of law, and "provides a *pro rata* expense against parties not voluntarily in court," it must be pointed out that courts having jurisdiction of the subject matter have a right to acquire jurisdiction of the person by service of process. And the legislature certainly has the power to authorize courts, after such courts have acquired this twofold jurisdiction, to tax costs according to the provisions of the statute. The legislature has general control over the rules of evidence and may change them at pleasure. (11 Am. & Eng. Ency. of Law, 550.) The legislature of the state has the power by statute to provide that certain circumstances shall constitute *prima facie* evidence of the facts in issue. The law of evidence, being a part of the remedy, is within legislative control. (*Von Hoffman v. Quincy*, 4 Wall. (U. S.) 535, 18 L. ed. 403.) It is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence in the courts of its own government. (*Fong Yue Ting v. United States*, 149 U. S. 698, 13 Sup. Ct. Rep. 1016, 37 L. ed. 905.)

Attorney General John A. Bagley, *Amicus Curiae*, files no brief.

Opinion of the Court—Sullivan, C. J.

SULLIVAN, C. J.—This is an original application in this court for a writ of prohibition to prohibit the district court of the third judicial district of the state of Idaho, in and for Canyon county, and Norman M. Ruick, Esq., master and referee appointed by said court, from proceeding to take the evidence in that certain cause in said court entitled the "Farmers' Co-operative Ditch Company, a Corporation, Plaintiff, v. The Boise City Irrigation and Land Company et al., Defendants," and from determining said cause or rendering any judgment therein in any way based upon the report of the state engineer or the trial, findings or conclusions of said referee and master, which action was commenced on the twentieth day of August, 1902, for the purpose of adjudicating the priorities to the waters of Boise river. This proceeding is brought by the Boise City Irrigation and Land Company, a corporation, one of the defendants in the above-entitled suit. Many of the defendants have appeared in said suit and filed answers and cross-complaints, claiming the prior right to the use of the waters of said river to the extent of the capacity of their ditches and appropriations.

On the twenty-third day of May, 1903, that court made an order under the provisions of section 37 of an act entitled "An act to regulate the appropriation and diversion of the public waters and establishing the rights to the use of such waters and the priorities of such rights," approved March 11, 1903 (Sess. Laws 1903, p. 223), which order was made without any objection and is as follows, to wit: "That the state engineer shall make an examination of the Boise river and of the canals and ditches diverting water therefrom, and of all the land being irrigated by said canals and ditches and other works, and the lands susceptible of reclamation therefrom, and prepare a map showing such river, canals and ditches and the lands thereunder, and a statement which shall give the condition of such works, their capacity and the amount of land irrigated from each of such canals, ditches and other works, and other essential features in relation to the reclamation of the lands tributary to such stream for use upon the hearing of said cause, as provided in said act." And it was further ordered that the

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cost of making such examination and preparing such map or maps should be paid by the parties to said suit as provided in said act.

Thereafter, on the twenty-seventh day of May, 1903, a certified copy of said order was served upon Wayne Darlington, Esq., state engineer of the state of Idaho, together with the following notice signed by the judge of said court:

“To Wayne Darlington, Esq., State Engineer, Boise, Idaho.

“Dear Sir: You are hereby requested to make an examination of the Boise river and of the canals and ditches diverting water therefrom, in accordance with the order of this court made on the twenty-third day of May, A. D. 1903, a copy of which is hereunto attached, for use upon the trial of the cause now pending in the district court of the third judicial district of the state of Idaho, in and for the county of Canyon, in which the Farmers’ Co-operative Ditch Company is plaintiff, and the Riverside Irrigating District et al. are defendants, said cause being a suit for the purpose of adjudicating the priorities of the rights to the use of water from said Boise river.”

Thereafter, on the twentieth day of June, 1903, the court made the following order:

“This cause coming on further to be heard upon the pleadings, and the issues in this cause having this day been settled and the cause now being ready for trial and the taking of evidence; now, for the information of the court, and the court deeming it a proper case therefor, announces to the attorneys in said cause that he is about to appoint a referee and master in said cause to take the evidence therein and report the same to the court, with conclusions of fact and conclusions of law therefrom. Whereupon, the New York Canal Company filed its objection in writing to the appointment of a referee herein, which objections were by the court overruled, to which ruling counsel for the said New York Canal Company duly excepted, and were given five days to prepare and serve bill of exceptions. And there being no further objections made by any of the parties to said suit to the appointment of a referee herein, and there being no objections made to the qualifications of Norman M. Ruick as such referee, it is hereby ordered that Norman M.

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Ruick be, and he is hereby, appointed referee and master in said cause, to take the evidence and report his conclusions of fact and law therefrom to the court for the information of the court.

"It is further ordered that said referee proceed to take and hear the evidence in said cause at Caldwell, Idaho, as soon after the state engineer makes his report in said cause as required by the order of this court made on May 23, 1903, as may be convenient to said referee and the parties to said suit, and that such referee is hereby given authority and power to adjourn said hearing to such other place and time as may be convenient to the parties and their attorneys in interest herein. That as soon as said evidence is completed and said referee is advised as to the proper conclusions of fact and law therefrom, he shall report the same to this court for further trial herein and disposition thereof. That said referee shall give notice to the attorneys in said cause of the times and places where the evidence in said cause will be heard.

"It is further ordered and directed that the clerk of this court shall deliver to said referee a certified copy of this order as his authority for acting herein."

It is further shown that said state engineer complied with the order of said court and filed his report with the clerk of the district court of Canyon county, and that the said Norman M. Ruick has qualified as such referee and master, and is about to proceed under the direction of said court to take the evidence in said cause.

On the sixth day of April, 1904, at the opening of the district court of said county, the Honorable George H. Stewart, judge of said court, announced from the bench that the report of the said engineer had been filed, and that he was about to enter an order directing said referee to proceed with the trial of said cause, and it is alleged that unless said court is prohibited from proceeding with said trial it will proceed and impose heavy costs, occasioned by the action of said state engineer upon the defendants in said cause, which costs amount to nearly \$11,000, a large portion of which will be pro-rated to and entered as a judgment against the plaintiff herein, the Boise City

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Irrigation and Land Company, without its consent and over its protest and objection.

To said petition or complaint the defendants filed a general demurrer on the ground, to wit, that said petition fails to state a cause of action entitling the petitioner to the relief prayed for. The case was submitted on the complaint and demurrer and the briefs and arguments of counsel. Counsel for the plaintiff specify numerous grounds for the issuance of the writ prayed for. The constitutionality of said act is questioned in several particulars.

It is contended that the subject of said act is not expressed in the title thereof, and for that reason is in contravention of the provisions of section 16 of article 3 of the state constitution, which provides that "Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title."

It is contended that the title of said act includes only "public waters," and that said act, by its provisions, includes private waters. It is also contended that the term "public waters" means only the waters the use of which is declared to be a "public use" by section 1, article 14 of our state constitution, and that if the term "public waters" have any meaning in our law whatever, it applies only to waters of which section 1 of our constitution declares that "The state may regulate and control in the manner prescribed by law." It has been the recognized law of this commonwealth for many years that the right to the use of waters may be acquired by appropriation. (See Rev. Stats. 1887, sec. 3155.) The evident idea of the legislature was that the state owned the waters within its boundaries and that the citizen might acquire by appropriation the right to the use of the same. It is clear that said act was intended to and does include all waters over which the state may exercise regulation or control.

If we take the view that the state owns the water while it is running in the natural channel and has the power to regu-

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late its use, and that the appropriator for irrigation can only acquire the right to the use of it, the title to said act is certainly broad enough to include the provisions of said act called in question by this proceeding. We have a number of provisions running through our irrigation law that provide for the regulation of the use of such water. It contains provisions providing the steps that must be taken to complete or perfect an appropriation. The law provides that a notice containing certain facts must be posted at the point where the water is to be diverted and that such notice must be recorded in the office of the recorder of the county where such location is made; that within sixty days after posting such notice work must be begun in the construction of the canal or ditch, and that such work must be prosecuted with reasonable diligence until the completion thereof; that the water must be applied to a beneficial use. The courts of the state may determine whether all those things have been done.

It is further provided that it is a misdemeanor to waste water, and when the appropriator's necessities do not require its use, he must let it run in the natural channel of the stream; and while it is so flowing it is in one sense "public water." Where water has been appropriated for agricultural purposes, it is not used for that purpose more than six or eight months in the year; the remaining part of the year the water is permitted to run in the natural channel of the stream, and may be used by others during the time that the prior appropriator does not need the use of the same. Thus it appears that the legislature has and does exercise a certain control over all the waters of the state while they are flowing in the natural channel of the stream, and the law follows the water after it is diverted therefrom to see that it is applied to a beneficial use. The provisions of the act clearly show that that was the meaning intended by the legislature to be applied to the term "public waters" as used in said title. The provisions of said act refer to the private use of water as well as the public use thereof.

We have under our law two classes of appropriations: (1) appropriations for private use and (2) appropriations for pub-

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lic use. The act proceeds upon the theory that all waters in the state running in the natural channel of the stream are "public waters"; and private rights authorized by the law are simply rights to the use of the "public waters" and not an ownership in them, at least while they are flowing in the natural channel. In that view of the matter, the title is sufficient to include provisions for the regulation of the appropriation, diversion and use of such waters, and to provide for the settlement of the priorities of appropriators.

Our attention has not been called to any section of our water right law or to any provision of our constitution where the term "public waters" has been used except in the act under consideration. It seems to be well settled that so long as water continues to flow in its natural channel, it is not, and cannot be, made the subject of private ownership except in so far as it is regarded as a part of the land by or through which the stream flows. Under the decisions it would seem that there is no distinct and separate ownership in the *corpus* of the water itself. (Long on Irrigation, sec. 72.)

We think that proposition is true, at least, until the water is diverted from its natural channel into the ditch or canal of the appropriator. It was held in *Kidd v. Laird*, 15 Cal. 162, 76 Am. Dec. 472, that running water, so long as it continues to flow in its natural course, cannot be made the subject of private ownership. A right may be acquired to its use which will be regarded and protected as property, but the right carries with it no specific property in the water itself.

The ninth section of the first act of Congress in regard to the appropriation of water passed on the twenty-sixth day of July, 1866, declares that "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes have vested and accrued and the same are recognized and acknowledged by the local customs, laws and decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same." (14 Stats. at Large, 253.) It will be observed from that act that the right to the use of water is granted. The legislature of this and other states upon that subject has been to the same

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effect, and has not given to the appropriator the ownership of the *corpus* of water itself, but only a right to the use of the water. As touching upon this proposition, see, also, *Atchinson v. Peterson*, 20 Wall. 507, 22 L. ed. 414; *Broder v. Natoma Water etc. Co.*, 101 U. S. 274, 25 L. ed. 790; *Sturr v. Beck*, 133 U. S. 541, 10 Sup. Ct. Rep. 350, 33 L. ed. 761. However, it is conceded by some courts that water taken from the natural channel by an appropriator and confined in his own works may be personal property. (See Long on Irrigation, sec. 72, and authorities cited.)

It is contended that said act is unconstitutional because sections 4 and 5 thereof contravene section 2 of article 5 of the state constitution, in that it vests in the state engineer judicial power. While the provisions of those sections authorize the state engineer to pass upon and decide certain questions and matters, in the first instance, they in no way conflict with the provisions of the said section of the constitution. If anyone is aggrieved by the decision of the state engineer, he has the right to appeal to the district court.

It is also contended that said act is unconstitutional, for the reason that it is antagonistic to subdivision 3 of section 19 of article 3, and of sections 2 and 26 of article 5 of the constitution of Idaho. Said sections refer to the enactment of local and special laws and provide that all laws relating to courts shall be general and of uniform operation throughout the state, and that the force and effect of the proceedings, judgments and decrees of such courts severally shall be uniform.

We are unable to see wherein any of the provisions referred to, since the decision of *Bear Lake County v. Budge*, 9 Idaho, 703, 75 Pac. 615, are repugnant to said provisions of the constitution. It is stated in Sutherland on Statutory Construction, section 121, where the author in discussing what is a special and what is a general law, says: "The state contains a great variety of subjects of legislation, each requiring provisions peculiar to itself. Generic subjects may be divided and subdivided into as many classes as require this peculiar legislation. . . . Nearly every matter of public concern is divisible, and division is necessary to methodical legislation. A statute re-

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lating to persons or things as a class is a general law; one relating to particular persons or things of a class is special." The term "general" is used as contradistinguished from special, and then it means relating to all other classes, instead of to one or a part of that class. (26 Am. & Eng. Ency. of Law, 532.) In *Brooks v. Hyde*, 37 Cal. 366, the court says: "The section of the constitution which provides that all laws of a general nature shall have a uniform operation means that every law shall have the uniform operation upon all the citizens, persons or things of any class upon which it purports to take effect, and that it shall not grant to any citizen or class of citizens privileges which, upon the same terms, shall not equally belong to all citizens."

The act under consideration relates to all of a class, that is, to wit, the appropriators and owners of water rights from the natural streams of the state. This class is general and at the same time peculiar in itself, and it is distinguished from all other classes both as to persons and subject matter by peculiar conditions. It is to those conditions and that class that the legislature has endeavored to apply the provisions of the act under consideration. A general rule has been laid down under which conflicting rights to the use of such water may be determined; and the rule there laid down is applicable to all alike in this peculiar class. The legislature, no doubt, concluded that the procedure for determining such rights should be as simple, effective and inexpensive as practicable under the conditions; and we think the rule laid down in said act is not in conflict with the above-cited sections of the constitution.

The provisions of sections 33 and 37 of said act are directly attacked. Said sections are as follows:

"Sec. 33. It shall be the duty of the state engineer or some qualified assistant to proceed, as soon as may be after the passage of this act, to make an examination of the streams of the state (beginning with those whose waters have not yet been allotted), and the works diverting water therefrom, said examination to include the measurement of the discharge of said streams and the carrying capacity of the various ditches and canals diverting water therefrom; an examination of the irri-

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gated lands, and an approximate measurement of the lands irrigated or susceptible of irrigation, from the various ditches and canals, which said observations and measurements shall be reduced to writing and made a matter of record in his office, and it shall be the duty of the state engineer to make or cause to be made, a map or plat on a scale of not less than one inch to the mile, showing with substantial accuracy, the course of the stream, the location of each ditch or canal diverting water therefrom, and the legal subdivisions of land which have been irrigated, and shall also note on such map the lands which are susceptible of irrigation from the ditches and canals already constructed. And such examination shall be made as rapidly as possible to include all the streams used for irrigation in the state. And the state engineer shall indicate on such maps the lands, the water rights for which have been adjudicated by the courts, noting on each tract the number of the priority of such rights, and whenever an application for a permit to appropriate water from a stream shown on such map shall be allowed, such engineer shall indicate on such map the line of such canal or ditch or other works, and indicate by appropriate colors the lands to be irrigated by such works, and shall note thereon the number of such permit. And whenever proof is made that water has been beneficially applied from such works to any of such lands, and license shall be issued for the same as in this act provided, the number of such license so issued shall be at once noted on such map on the subdivision of such lands to which such license shall relate, and all these and other facts relating to the development of irrigation on such stream shall be carefully posted on such map."

"Sec. 37. Whenever suit shall be filed in the district court for the purpose of adjudicating the priorities of rights to the use of water from any stream in the state and before such adjudication is made, the judge of such court shall request the state engineer to make an examination of such stream and the canals and ditches diverting water therefrom and of all the land being irrigated by such canals and ditches and other works and the lands susceptible of reclamation therefrom in the manner provided in section thirty-three (33) of this act, and such

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state engineer shall prepare a map showing such stream, canal and ditches and the lands thereunder as provided in such section and a statement which shall give the condition of such works, their capacity and the amount of land irrigated from each of such canals, ditches or other works and other essential features in relation to the reclamation of the lands tributary to such stream. And such map and statement shall be accepted as evidence in the determination of such rights by such court, and a copy of such map and statement shall be placed on file in the office of the state engineer.

“Whenever the state engineer shall make such examination at the request of the court or the judge thereof, the actual cost of making such examination by the state engineer or his assistant and of preparing such maps and statement as shown by sworn statement of such costs prepared by such state engineer, shall be paid by the persons interested in such suit for the determination of such priorities, the amount of such costs to be pro-rated by such court to the persons whose rights have been adjudicated by such suit. In case the state engineer has already made such examination as provided in section (33) of this act, he shall be requested by the court or the judge to furnish a certified copy of the records of the examination, which shall be brought up to date by a further examination on the ground by such engineer if need be, and such certified copies of such records shall be filed and received as evidence in such case as in this section provided.”

By section 33 it is made the duty of the state engineer, as soon as may be after the passage of said act, to make an examination of the streams of the state and the works diverting water therefrom, beginning with those streams, the waters of which have not been allotted. The term “allotted” as there used means decreed by the proper court. Under the provisions of that section the work required to be done by the state engineer must be paid for by the state, and it is for the purpose, among others, of making a permanent record of the water appropriations and rights to the use thereof. We find no prohibition in the constitution inhibiting the legislature

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from enacting said section 33. If the cost of such work is more than the people desire to pay, the remedy is with the legislature.

Section 37 provides, among other things, that when suit shall be filed in the district court for adjudicating the priorities of the rights to the use of water from any stream, the judge shall request the state engineer to make an examination of such stream and the canals and ditches diverting water therefrom, and of all lands being irrigated by such canals and ditches and other works and the lands susceptible of reclamation therefrom in the manner provided by said section 33. The cost of making such survey, examinations, maps, statements and reports are to be pro-rated as costs against the persons whose rights shall be adjudicated in such suit. It is also provided by section 37 that if the state engineer has already made examination and prepared the necessary maps provided for in section 33, "he shall be requested by the court or judge to furnish a certified copy of the records for examination, . . . and such certified copy of such records shall be filed and received in evidence in such case as in this section provided." It will be noted that the cost of making a survey and maps above referred to are only taxed as costs in those cases where the streams have not been examined by the state engineer and maps and plats made prior to the request for the evidence by the trial court. It will also be noted that said act provides that the state engineer shall make such examination, maps and surveys beginning with those streams whose waters have not yet been allotted.

In cases where the engineer has made such examinations and maps prior to the trial and the commencement of the action, the state pays the costs thereof, but that where such examinations and maps are made on the request of the judge as provided in section 37, the parties to the action are required to pay such costs.

It is contended that section 4901 et seq. of the Revised Statutes provides a general system for the apportionment of costs in civil actions, and there is nothing so far as the determination of the rights to the use of water are concerned that takes

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an action of this kind from under the general rules thus established for the apportionment of costs.

It must not be forgotten that this is a suit in equity, and the apportionment of the costs would be, without a statute, largely in the discretion of the trial court. From past experience the legislature no doubt concluded that it was necessary for the interests of the state and all concerned to have such examinations and maps made by the state engineer, and we find no inhibition in the constitution prohibiting the legislature from providing for such examinations and maps, and their use as evidence on the trial and authorizing the trial court to prorate the costs thereof among the several parties to the suit.

It has been the custom of courts of equity in this state, in the trial of mining cases and litigations in regard to the dividing line between tracts of land, to appoint an engineer or surveyor to make the proper surveys, make plats thereof to be used in the trial of such cases, and to require the parties to such actions to pay the costs thereof, and we think a court of equity has authority to do that. It is contended that said provisions of said act are special and only apply to water cases. While the last contention is true, it certainly would not be contended that an examination of the streams of the state and the making of plats of such streams and ditches would be required in an action on a promissory note or to foreclose a mortgage, or an action to recover damages for defamation of character, or, in fact, in any action except in a water suit. So this act applies to all suits of a certain class and is not violative of any provision of our state constitution.

It is also contended that under this act a party may prove himself absolutely in the right so far as his claim to the right to the use of water is concerned, and may have been brought into litigation without his consent and still be compelled to pay part of the heavy expenses necessarily incurred by reason of this suit, and for that reason it contravenes every part of our laws regulating suits in courts of justices so far as the apportionment of costs is concerned. There is nothing in this contention, for the reason that it is a part of the history of the state that where several persons have settled upon a stream and

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diverted water from it at different times and in different amounts for irrigation purposes that it is absolutely necessary to determine the priority of their rights and the amount of water to which each is entitled by a decree of the proper court. That must be done on every stream in the state, and, of course, as long as there is ample water in the stream to supply the necessities of each appropriator, suits are not liable to be brought for the settlement of such priorities, but as soon as more water has been claimed than the stream supplies, the prior appropriators, if they live low down the stream, are required to bring an action to settle the rights of the respective appropriators from such stream, and it has been the custom of courts in this state to apportion the costs of such litigation to the respective parties, and we think properly so. The court in the suit in question had jurisdiction and power to so apportion such costs.

It is also contended that it is contrary to every principle of right and justice to compel parties who have already been to the expense of procuring surveys of their water canals and other appliances for diverting water to pay any part of the expenses for further services, as no benefit would accrue to them from it. It is a sufficient answer to this objection to say that the legislature has concluded that it was better for all parties concerned to have such maps and plats made by the state engineer, or some disinterested person, and if the maps and plats required by the provisions of said sections are made as contemplated, they no doubt would save much to the litigants or parties to said action in witness' fees, even more than their *pro rata* part of the cost of making the same.

It may be unfortunate for the parties to this suit that the state engineer had not proceeded under the provisions of section 33 of said act, and prepared the statement, maps and plats in question before the trial of this action. The law contemplates that he shall proceed and perform the required work as rapidly as such work can be reasonably done; for in case the work had been done, the parties to this action would only have to pay their proportional part as taxpayers of the state. Whereas, under the present facts they are required to pay the

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entire costs of such work. But we do not think this a sufficient cause for holding the act unconstitutional. As before suggested, the state engineer is only entitled to recover the actual and necessary costs of such work; and any party to the suit may contest his right to recover the sum claimed by him. And, of course, if it should be made to appear in any particular case that the cost would result in a confiscation of the property included in the litigation, a judge would not be justified in having such maps and plats made. We find nothing in the decision of this court in the case of *Bear Lake County v. Budge, supra*, that conflicts in any way with our views expressed in this opinion.

Said section 37 provides, *inter alia*, "That the judge of said court shall request the state engineer to make an examination of such stream, etc." That provision is directory and it is left to the sound discretion of the judge whether such request shall be made or not.

It is also contended that there are no safeguards provided so far as costs are concerned, and that the matter is left absolutely in the hands of the state engineer without control by the court. We cannot agree with this contention. The state engineer is entitled only to his actual and necessary costs for the work required to be done under the provisions of said sections 33 and 37, and any party to the suit may contest the amount claimed by him or any item thereof. It is the duty of the court to refuse to allow any costs to the state engineer except such as are actually necessary for the performance of the duties required. In case it is shown that the maps and plats are incorrect as to the rights of any of the parties to the action, such parties should not be required to pay any part of such costs. In this case it is admitted that the claim of the state engineer amounts to nearly \$11,000. It was also stated that such costs, if pro-rated, would be about four cents per acre for all of the lands under the ditches involved in this case. That being true, the *pro rata* share of the owner of each one hundred and sixty acres of land would be \$6.40. The requirement of the payment of that amount as costs by the owner of one hundred and sixty acres of land certainly would not result in confiscation of very

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much property, especially when such lands are reputed to be worth at least \$30 per acre.

If said maps and plats have been made as contemplated by said act, in all probability the parties to the suit would need no further evidence in the establishment of their rights than said maps and plats and their own testimony. It would appear to me that in the end the litigants will save a great deal of costs and expenses on account of witnesses which would otherwise be required to establish their rights.

While \$11,000 seems a large sum to be paid as costs for such maps and plats, it must be remembered that nearly two hundred thousand acres of land and water rights for the irrigation of the same are to a large extent involved in this action, and the land without the water would be of very little value. If such land with the water right is worth \$30 per acre, the lands and water rights would be worth about \$6,000,000. Every person who appropriates water under the laws of this state must remember that it is sure to cost something for a final adjudication of such rights and that they must pay the costs.

It is further contended that as this action was commenced prior to the enactment of the law under consideration, its provisions are not applicable to this suit; that to apply them to this action would make said act retroactive and retrospective in its operation. The provisions of said section 37 prescribes certain procedure in suits for the settlement of water rights, and we think the general rule is that rules of procedure, especially so far as costs are concerned, may be changed during the pendency of an action, and we think it well established that the litigant has no vested right therein. It is stated in Sutherland on Statutory Construction, section 482, "No person can claim a vested right in any particular mode of procedure for the enforcement or defense of his rights. Where a new statute deals with procedure only, *prima facie* it applies to all actions—those which have accrued or are pending, and future actions. If before final decision a new law as to procedure is enacted and goes into effect, it must from that time govern and regulate the proceedings."

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It is also stated in 5 Encyclopedia of Pleading and Practice, page 113, as follows: "At any time during the pendency of the suit and before the right to costs has become vested, the legislature may change the law previously enforced either by totally repealing it or by modification only, or in the absence of any law it may enact one." Even under penal statutes it was held in *Hopt v. Utah*, 110 U. S. 574, 4 Sup. Ct. Rep. 202, 28 L. ed. 262; "Alterations which do not increase the punishment, nor change the ingredients of the offense, or the ultimate facts necessary to establish guilt, but only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury *can be made applicable to prosecutions of trials thereafter had*, without reference to the date of the commission of the offense charged." We think that the provisions of said section relating to the point under consideration were intended to, and do, apply to suits begun before the enactment of said law as well as those commenced after. We understand that statutes generally are to be construed as prospective unless the language is such as to show that they were intended to be retrospective. But even if the legislative intent was to have the provisions of said act apply to suits that should be commenced after its enactment, we think the court had jurisdiction in the case under consideration to order such plats and maps made if it was convinced that it was necessary for the proper hearing and determination of said case to have such maps prepared.

It is contended that the provisions of said section 37 provide for a new kind of evidence, and that said act does not provide whether such evidence shall be conclusive or only presumptive, and that if it is to be received as *prima facie* evidence only, then it would involve the party disputing it in double expenses and costs, because he would be required to have other surveys made at his own expense in order to show the errors committed by the state engineer, and that such pro-

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vision is a radical innovation on the old form of evidence, something unheard of in legal procedure, and should be held invalid for that reason. I think it was the intent of the legislature to authorize the court to accept such evidence just the same as any other evidence is accepted and to consider it with all the other evidence in the case, and if it is shown to be incorrect, to reject it; otherwise to give it such effect as under all the evidence the court might think it entitled to. I think the legislature has the power to authorize such maps and plats to be introduced as evidence in a case, leaving it with the court to decide what effect should be given to the same. The legislature has provided that certified copies of certain recorded instruments may be used as evidence, and that some of such instruments when introduced shall be *prima facie* evidence of what they contain. The legislature has not declared what effect should be given to the statements and maps referred to, leaving it for the court to decide what effect should be given to them. Under the provisions of said section statements and maps made by a sworn officer of the state are authorized to be used as evidence in such cases, and we think the legislature had ample authority to do so.

The provision referred to contemplates that the maps and statements of the state engineer shall constitute a part of the public records, and also provides for using them, as well as certified copies thereof, as evidence in the trial of water cases. And so far as evidence is concerned, it merely states a general rule of proceeding. The authorities hold that the legislature has power to change by statute the rules of evidence at pleasure. In 11 American and English Encyclopedia of Law, 550, it is stated: "The legislature has general control over the rules of evidence and may change them at pleasure."

In *Von Hoffman v. Quincy*, 4 Wall. 535, 18 L. ed. 403, it is said: "The legislature of this state has the power by statute to provide that certain circumstances shall constitute *prima facie* evidence of the facts in issue. The law of evidence, being a part of the remedy, is within legislative control." And in *Fong Yue Ting v. United States*, 149 U. S. 905, 13 Sup. Ct. Rep. 1016, 37 L. ed. 905, the court says: "It is within the

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acknowledged power of every legislature to prescribe the evidence which shall be received and the effect of that evidence in the courts of its own government.”

It is further contended that the court exceeded its jurisdiction in appointing Norman M. Ruick, Esq., referee and master, and authorizing him to take the testimony in said case and report his findings of fact and conclusions of law for the information of the court. Under the provisions of section 4493, Annotated Code of Civil Procedure, Session Laws of 1901, page 132, the court or the judge at chambers is authorized to appoint a referee to take the testimony in certain cases therein designated. The purpose and object of that act is expressed in the title as follows: “An act to provide for taking testimony out of court upon an order of the court or the judge thereof,” and was enacted for the purpose of taking testimony in certain cases where the parties to the action were numerous and the convenience of the witnesses and the ends of justice would be promoted thereby. The legislature, no doubt, had in mind in the enactment of that law the taking of testimony in water cases where the parties and witnesses were very numerous and the convenience of the witnesses and the ends of justice would be promoted by the appointment of a referee to take the evidence. I think the court had full power and authority to appoint said referee. Of course it is contemplated that a referee will not be appointed, and thus increase the costs of the suit unless it is necessary to do so, for if the judge tries the case, the costs of a referee are saved to the litigants. That part of the order which directs the referee to “report his conclusions of fact and law therefrom to the court for the information of the court,” of course is not binding on the court, and is only for the information of the court, and in no wise invalidates the order.

Under the provisions of section 2825, Revised Statutes, ditches and water rights are declared to be real property. A water right may be held and sold and transferred separate from land, and, until the act under consideration became a law, we had no law providing for a record of the title to water rights as we have of a record of title to land. The legislature no doubt considered that the time had come in this state when a

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record by maps, plats, etc., should be made of titles to ditches and water rights, as water rights have become very valuable property in this state.

Said section 33 provides for plats and maps of all ditches and water rights and thus lays the foundation for a record title to that class of property to a certain extent at least. The provisions of that section makes it the duty of the state engineer and qualified assistants to proceed to make an examination of the streams of this state, beginning with those whose waters have not been allotted, and make maps and plats thereof containing certain things mentioned in said section, and thereafter to indicate on such maps subsequent appropriations of water from the stream or streams covered by such maps. When such maps are completed the state has a record that is of great value. While we have had a law for years providing for a record of water location notices, such record is of no value as to the quantity of water actually appropriated under such notices, and the maps and plats would furnish much information in regard to canals, ditches and water rights.

I think the title to said act is sufficient to include the provisions of said act attacked in this proceeding as unconstitutional. That the court had authority to request the state engineer to make the maps and plats referred to and appoint a referee to take the evidence in said case and report to the court for its information, and from said referee's findings of fact and conclusions of law contained in said report to pro-rate the costs among the parties.

The application for the writ is denied.

Ailshie, J., concurs in the conclusion reached.

(July 1, 1904.)

STOCKSLAGER, J., Dissenting.—I concur with my associates in the conclusion that the district court in the exercise of its discretion may appoint a referee to take the evidence and report findings and conclusions to that court. When such an order is made this court will not disturb it unless it distinctly shows an abuse of such discretion. The fact that the wisdom

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of such proceeding might be doubted or questioned is not sufficient cause for a reversal. We find by the admitted facts in this case that by the provisions of sections 33 and 37 of the laws of 1903, this case reaches the referee loaded down with about \$11,000 costs, all of which have accrued in the office of the state engineer. Following this will come the cost of the referee and the trial before him; then anyone who feels aggrieved by his findings and conclusions must follow his case into the district court with the additional cost of a further hearing there.

We are told that great benefits will flow from the record to be made in the office of the state engineer, in that it will there be shown just how much water is appropriated and used from the Boise river. This may be information of value to the future appropriator, but of what interest is it to the appropriator who has spent years of his time, labor and money acquiring a home all dependent upon the energy he has put forth in securing his prior right to the use of such water? It certainly must be conceded that the provisions of this law providing for making a record in the office of the state engineer for use on the trial and for future reference, as well as the maps provided for, adds enormously to the cost of this trial. Can it be said it is for the benefit of the present appropriators? We think not. They should be permitted to try their case on such evidence as suits their convenience and ability to pay for. If the parties to this litigation desire to use maps, why should they not be permitted to employ a civil engineer of their own choice to prepare such maps as they need? It is urged that one party to this litigation has a complete map showing all necessary things to establish its right to the use of the waters of this stream; that this map was prepared at large expense. Should it be required to pay its share of the expense of a map prepared by the state engineer for which it has no use? We think not. The theory of the law is that all parties to litigation may proceed in such way as seems best to them, and provide the court with the kind or character of evidence as will best serve their purposes, and hence they are not chargeable with a class of evidence they have not asked for and which the legislature has attempted to force upon them and make it a proper and necessary charge against them.

Opinion of the Court—Stockslager, J., Dissenting.

It is not within the constitutional power of the legislature to prescribe any particular method by which a citizen of this state must establish his right to the use of the waters of the streams of the state that he has appropriated and used long years prior to the enactment of such laws. It is urged that no one is bound by the report and maps of the state engineer; that anyone may produce other evidence or witnesses on the trial of the cause. This is true, but, nevertheless, each and all parties to the litigation are required to pay their proportionate share of the \$11,000 expenses of the state engineer's office. In other words, the litigant is not consulted as to whether or not he is willing to accept the maps and report of the state engineer as evidence in the case, but he must pay his proportion of such costs, and if he is dissatisfied, counsel for defendants are charitable enough to suggest that he may procure such other evidence as suits him to impeach the record of the state engineer—so long of course, as he is willing to pay for the evidence furnished—not at his request, or even his consent, but by legislative enactment. I do not think the legislature has the power to thus burden the people of the state who are so unfortunate as to have homes dependent upon the waters of an unlitigated stream. The settlers should be permitted to determine their rights as between themselves by such evidence as seems satisfactory to them, and if it is a matter of state interest, it is the duty of the state to provide such maps and records at the expense of the state, or if in the interest of the future applicants for the waters of such streams, then the burden should be borne by them, or the state for them, and not by those who have been diligent and industrious in procuring what they had a right to believe was a home and sufficient water to irrigate it without molestation and expense imposed upon them by the state. It is clear to me that they have this right, and any act of the legislature attempting to provide evidence at their expense in the settlement of their rights as between themselves or future appropriators is a violation of section 19, subdivision 3, article 3 of the state constitution, which says: "The legislature shall not pass local or special laws in the following cases, that is to say, regulating the practice of courts of justice."

Opinion of the Court—Stockslager, J., Dissenting.

In the case of *Bear Lake County v. Budge*, 9 Idaho, 703, 75 Pac. 614, in passing upon the constitutionality of sections 34, 35 and 36 of the act in question, this court said: "We have a general law providing how the summons must be served in cases to quiet title or determine adverse interests to private property, and the provisions therefor in the act under consideration provide a different method brought by a water commissioner for that purpose. Said act is also in violation of our statute which requires suits to be brought in the name of the real party in interest." I concurred in that opinion, and for the reason therein enunciated and the authorities therein cited I cannot concur in this. If sections 34, 35 and 36 were special legislation for the reasons therein stated, then section 37 is special legislation for the reason that it attempts to provide evidence and charge it to all the litigants of the case, irrespective of whether they need or desire it or not. Again, it does not even leave it to the discretion of the court to determine who should pay for this special class of evidence. If it did, there would be more justification in the law, as the court could, in the interest of justice, charge the costs of his class of evidence to such claimants as should rightfully pay for it.

Another serious and important question is raised and urged by the plaintiff in this action, and that is the manner in which the law attempts to enforce the collection of the costs of the state engineer's office. It provides that a judgment shall be rendered against each party, let him be plaintiff or defendant, but does not say in whose favor the judgment shall run, hence the question arises, How shall this judgment be entered? Not in the name of the state engineer, for the reason that he is not a party to the action; not in the name of the state or county, for the same reason. I think the legislature had the same difficulty in settling this question that confronts me. The majority opinion says: "It has been the custom of courts in this state to apportion the costs of such litigation to the respective parties, and we think properly so. The court in the suit in question had jurisdiction and power to so apportion such costs." That is true so far as all costs in an action of this kind may be concerned aside from the cost of the state engineer's office. Here

Argument for Appellant.

is a special provision of the law providing that each party shall pay his proportion of this cost and that a judgment shall be entered for it. Again, we ask, in whose favor? If the law had provided that anyone refusing to pay his proportion of this cost, the state, or the plaintiff in the action should pay it, and a judgment entered against the party refusing to pay, in favor of the party paying it, then the court could enter a proper judgment.

I apprehend the trial court will find difficulty in rendering a judgment that will have validity or can be enforced.

For the foregoing reasons, I think the writ should issue.

(May 25, 1904.)

GATWARD v. WHEELER.

[77 Pac. 23.]

ATTACHMENT—WHAT AFFIDAVIT SHOULD CONTAIN.

1. An affidavit for an attachment must contain an allegation in unequivocal language that the debt sued on is due before the writ of attachment should issue.

(Syllabus by the court.)

APPEAL from the District Court of Shoshone County, from an order sustaining a motion to dissolve and discharge an attachment. Judgment affirmed. Honorable Ralph T. Morgan, District Judge.

The facts are stated in the opinion.

W. T. Stole, for Appellant.

If the term "indebted" has no legal signification there might be some room for argument. The supreme court of Wisconsin in the case of *Towbridge v. Sickler*, 42 Wis. 420, has adjudicated the meaning of the word "indebted." The court says: "It has been held in Louisiana that the words 'really indebted' convey the idea of a debt actually due and payable; not *debitum in*

Argument for Appellant.

praesenti, solvendum in futuro. No weight seems to have been given to the adverb "really." (*Parmele v. Johnston*, 15 La. 429; *Wilcox v. Jamieson*, 20 Colo. 158, 36 Pac. 902; 1 *Estee's Pleading and Practice*, sec. 605; *Bliss on Code Pleading*, sec. 152, 210; *Farron v. Sherwood*, 17 N. Y. 227; *Mayes v. Goldsmith*, 58 Ind. 94.) The second ground for discharging the attachment was that the affidavit therefor was insufficient, in that the indebtedness therein mentioned was not stated to be due at the time of the execution or filing of the affidavit, or at the beginning of the action, or at all. Here we have the same question presented to the court of the meaning of the word "indebtedness," except that the affidavit and its contents depend entirely upon the statute and not upon the common law. If, therefore, the statute is complied with, that is all that can be required. It must be observed that the remedy of attachment is extraordinary, resting wholly upon authority from the statute. It is a creature of legislative enactment, and all steps prescribed by the statute must be strictly followed in substance. (*Drake on Attachment*, par. 97; *Cal. Code Civ. Proc.*, sec. 538; *Weaver v. Hayward*, 41 Cal. 117; *Trowbridge v. Sickler*, 42 Wis. 417; *Quarles v. Robinson*, 2 Pinn. 97 (1 Chand. 29); *Lenox v. Howland*, 3 Caines, 323.) It is true that in many states the authorities hold that the words "is due" or "is now due" are necessary to the affidavit, but an examination of those decisions will disclose that the statute of those states requires a recital in words that the debt "is due." In Michigan, for instance, the authorities hold an affidavit insufficient and the court without jurisdiction, unless it is stated that the debt is due; this is because the statute in words requires it. (*Mathews v. Densmore*, 43 Mich. 461, 5 N. W. 669; *Cross v. McMahon*, 17 Mich. 511, 97 Am. Dec. 203; *Wells v. Parker*, 26 Mich. 102.) These authorities do not conflict nor confuse the Idaho statute. On the other hand, it clears our position and renders the affidavit sufficient. The simple and elementary principle contended for here is that it is never, under any circumstances, necessary to go beyond what the statute requires; but that it is necessary to fulfill the terms of the statute. The supreme court of Idaho is directly in accord with this principle of law, it being an-

Opinion of the Court—Stockslager, J.

nounced in the case of *Kerns v. McAulay*, 8 Idaho, 558, 69 Pac. 539.

A. A. Crane and C. W. Beale, for Respondents.

The declaration in the complaint that the defendants were indebted to the plaintiffs, under the decision of this court, is not a sufficient declaration upon which to found a judgment on account for goods, wares and merchandise. In the case of *Holton v. Sand Point Lumber Co.*, 7 Idaho, 573, 64 Pac. 889, this court held that the complaint must contain a declaration that the account or debt sued upon was due at the time of the commencement of the action. The complaint in said action did not contain any positive declaration that the debt was due; to which a demurrer was filed charging the same to be insufficient for that reason, which demurrer was by the lower court overruled, and which ruling of the lower court this court held to be error. An attempt was made to join the wife of the defendant in the action brought upon what the complaint alleges to be a community debt, and that in the face of the decision of *Jaeckel v. Pease*, 6 Idaho, 131, 53 Pac. 399, which holds that a married woman not only cannot be sued for the debt of the community, but cannot even make a contract binding herself to pay the community debt. The affidavit for attachment does not allege that the indebtedness sued upon was due. (*Kerns v. McAulay*, 8 Idaho, 558, 69 Pac. 539.)

STOCKSLAGER, J.—This case is here for review on two appeals from the district court of Shoshone county. December 14, 1903, plaintiffs filed their complaint in the district court praying for a judgment against defendants for the sum of \$3,129.26; on the same day the clerk of the district court issued an attachment, and on the twenty-ninth day of December the sheriff returned the writ with his service showing he had levied on certain real estate in Shoshone county alleged to be the property of defendants.

At the time of filing the complaint the plaintiffs caused to be filed an affidavit for attachment, to wit: "That the defendants are indebted to the plaintiffs in the sum of \$3,129.26 over

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and above all legal setoffs or counterclaims upon an account for the reasonable value of goods, wares and merchandise sold to defendants by the plaintiffs between January 1, 1903, and December 10, 1903, and that the payment of the same has not been secured by any mortgage or lien upon real estate or personal property or any pledge of personal property." On the same day the complaint and affidavit were filed and an undertaking in the sum of \$3,129.26 was also filed with the National Surety Company, a corporation, of New York, as surety. The obligation in the undertaking is as follows: "The condition of the foregoing obligation is such that if the defendants above named recover judgment in said action, or if the attachment therein be wrongfully issued, the plaintiffs will pay all costs that may be awarded to defendants and all damages which they may sustain by reason of the attachment, not exceeding the sum specified in this undertaking."

On the fourth day of January, 1904, counsel for defendants moved to set aside, dismiss and quash the levy and service of the writ of attachment in said action, and to discharge the said writ of attachment heretofore issued herein on the ground that the said writ of attachment was improperly and irregularly issued in said action for the following reasons, to wit:

"1. That the complaint in said action does not state facts sufficient to constitute a cause of action against said defendants or either of them.

"2. That the affidavit for attachment filed in said action was defective and insufficient in this: that it does not state that the indebtedness mentioned in said affidavit was due at the time of the execution or filing of said affidavit or at the beginning of said action, or due at all.

"3. That the undertaking on attachment filed in said action was defective, insufficient and void and not such an undertaking as required by the laws of the state of Idaho."

The provisions of section 4304 of the Code of Civil Procedure of the state of Idaho, as amended by the act of the legislature of said state, approved on the fourteenth day of February, 1899, and the act of February 23, 1899, regulating surety companies found on pages 337, 338, 339 and 340 of the

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General Laws of the state of Idaho, . . . and that said undertaking does not show and was not accompanied with any evidence, documentary or otherwise, showing *prima facie* that the surety company mentioned in said undertaking had qualified to do business in the state of Idaho.

On January 8th it is shown by the court proceedings that this case was placed on the calendar on motion of counsel for defendants, and the following order made: "At this day on motion of C. W. Beale, Esq., of counsel for the defendants, this cause was ordered placed on the calendar, whereupon the demurrer of the defendants and the motion of the defendants to discharge the attachment heretofore issued herein came on to be heard before the court. . . . After argument by counsel the said demurrer was sustained and the motion allowed."

On the same day plaintiffs gave notice of their intention to appeal from the order dissolving the attachment and filed their undertaking in the sum of \$6,300, being double the amount of the claim sued for conditioned for the payment of all costs and damages that may be awarded against the plaintiffs. On the ninth day of January, 1904, the court made the following entry:

"The motion of the defendants in the above-entitled action to discharge the writ of attachment issued in this action came on to be heard before said court on the eighth day of January, 1903, in open court, counsel appearing for plaintiffs and defendants and the court being fully advised in the premises makes its order granting said motion, Wherefore it is hereby ordered that the said writ of attachment heretofore issued in the above-entitled action be, and the same hereby is discharged.

"Done in open court this ninth day of January, A. D. 1904.

"R. T. MORGAN,

"District Judge."

From this order an undertaking was filed in the sum of \$6,300, double the amount involved in the suit, to stay proceedings on the attachment. On the ninth day of January, 1904, the following bill of exceptions was settled and allowed:

"Be it remembered that on the eighth day of January, 1904, the above-entitled cause came on for hearing upon defendants'

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motion to discharge the writ of attachment herein, and after argument by counsel for respective parties, the court granted said motion, that thereafter and on the ninth day of January, 1904, the defendants presented to the court an order discharging said attachment dated the ninth day of January, 1904. Thereupon the counsel for plaintiffs objected to the signing of said order as of date January 9, 1904, and requested the court to sign said order discharging said attachment as of date January 8, 1904, which said request the court refused, and signed said order as of January 9, 1904; to the refusal of the court to sign said order as of January 8, 1904, as requested, plaintiffs excepted and the exception was allowed. The foregoing bill of exceptions is signed and settled by the court this ninth day of January, 1904.

“R. T. MORGAN,
“Judge.”

On January 8, 1904, a certificate signed by John H. Meyer, Insurance Commissioner for the state of Idaho, was filed in the district court of Shoshone county, stating that the National Surety Company, 346 Broadway, New York, N. Y., is duly licensed to transact business in the state of Idaho until April 30, 1904.

From this record it will be seen that the only question before us for determination is the sufficiency of the various steps taken in aid of the attachment proceeding.

It is urged by counsel for respondents in support of his motion that the affidavit is defective, in that it did not allege that the debt sued upon was due at the time of making and filing the affidavit, and in support of this contention cites *Kerns v. McAulay*, 8 Idaho, 558, 69 Pac. 539.

The above decision was rendered by this court June 4, 1902, and in passing upon an affidavit similar in terms to the one under consideration, this court, speaking through Mr. Justice Sullivan, says: “Said statute in terms does not require the affidavit to state that the indebtedness is due, but by necessary implication it clearly requires it.”

We have carefully reviewed the authorities cited by counsel for appellant, to wit: Drake on Attachment, par. 97, sec. 107;

Points decided.

Weaver v. Hayward, 41 Cal. 117; Idaho Rev. Stats., sec. 4303, subd. 1; *Trowbridge v. Sickler*, 42 Wis. 417, and cases there cited; 2 Chitty's Pleading, 385; *Mathews v. Densmore*, 43 Mich. 461, 5 N. W. 669, and cases cited; *Wilcox v. Jamieson*, 20 Colo. 158, 36 Pac. 902.

We find nothing in these authorities that we think would warrant us in changing our views expressed in *Kerns v. McAulay*. The attachment law is severe enough in its terms in this state, and we think the affidavit should state in unequivocal language that the debt is due before the writ should issue. It certainly cannot be said that under the terms of the statute a writ of attachment can legally issue until the debt is due, and this being true, it was evidently the intention of the legislature that such fact should be shown by the affidavit.

Other errors are assigned, but as our views above expressed entirely dispose of the question of the sufficiency of the affidavit for attachment, we deem it unnecessary to pass upon them.

The order of the court appealed from is affirmed, with costs to respondents.

Sullivan, C. J., and Ailshie, J., concur.

(May 27, 1904.)

HUNTER v. PORTER.

[77 Pac. 434.]

NOTICE TO PAY RENT OR SURRENDER POSSESSION—OPTION TO TERMINATE LEASE—UNLAWFUL DETAINER—DEFENSES IN UNLAWFUL DETAINER—COUNTERCLAIM—CROSS-COMPLAINT—WHEN EACH AVAILABLE—BREACH OF COVENANT BY LESSOR—IMPLIED COVENANT OF FITNESS OF PREMISES.

1. A notice by the landlord to his tenant under sections 5093 and 5094, Revised Statutes, requiring him to pay rent due or surrender possession, describing the premises and naming the amount due, is a substantial compliance with the statute and is held sufficient.

Points decided.

2. Where the lessor by the terms of a lease reserves to himself an option to *terminate* the lease upon service of a thirty days' notice after breach by the tenant of some covenant thereof, he is not thereby precluded from pursuing his remedy under section 5093, Revised Statutes, in case the tenant fails to pay rent when due.

3. The service of notice and commencement of action under sections 5093 and 5106, Revised Statutes, for failure to pay rent when due, does not primarily terminate or forfeit the lease, but a payment of the rent together with interest, damages found and costs at any time within five days after judgment keeps the lease alive and saves it from forfeiture.

4. Chapter 4 of title 3 of the Code of Civil Procedure, Revised Statutes of 1887, provides a "Summary Proceeding for Obtaining Possession of Real Property," and an action prosecuted thereunder by the landlord for an unlawful detainer by the tenant is not subject to counterclaim or cross-complaint the same as ordinary actions.

5. In an action for unlawful detainer a claim for unliquidated damages arising out of a breach of a covenant made by the lessor is not a proper matter for counterclaim or cross-action under sections 4184 and 4188, Revised Statutes.

6. A cross-complaint under section 4188, Revised Statutes, must relate to or depend upon the contract or transaction on which the main case is founded or affect the property to which the action relates, but does not necessarily seek its relief against all or any of the original plaintiffs or defendants.

7. A counterclaim, while it must exist in favor of the defendant and against the plaintiff, may, in other respects, go further than a cross-complaint, and, if the cause of action arose on contract may set forth any other cause of action arising on a contract as a counterclaim thereto.

8. Where an agreement of lease refers to the premises demised as a "Cold Storage Building" not merely as a description of the situs but as a designation of its character, and contains a stipulation restricting its use to such articles as are ordinarily required to be stored for preservation, in such a place as is commonly known and designated as a "cold Storage Building," an implied warranty of fitness for such use and purpose will arise therefrom.

(Syllabus by the court.)

APPEAL from District Court in and for Latah County.
Honorable Edgar C. Steele, Judge.

From a judgment for plaintiff and an order denying defendant's motion for a new trial, defendant appeals. Judgment for rents and possession of premises and costs is affirmed.

Argument for Appellant.

I. N. Smith, for Appellant.

It is first contended that the court erred in not granting the nonsuit. The thirty days' notice provided in the lease was not given; hence the lease has never terminated. The action for "unlawful detainer" is based upon the idea that the relation of landlord and tenant existed, but through some event—lapse of time, or breach of condition and notice—the tenancy has terminated, and notwithstanding the rights of the tenant have ceased, he still continues in possession without the consent of the landlord. There is nothing in this case that shows that the tenancy has ever terminated. The parties by their contract, fixed the time of notice of election to terminate the same, and this election was never exercised. This being true, the cause could not be maintained as an action of unlawful detainer. The time stipulated in this lease was one of the considerations thereof. Notice for that period was necessary. (18 Ency. of Law, 2d ed., pp. 113, 630; *Pickard v. Kleis*, 56 Mich. 604, 23 N. W. 329; *Bauer v. Knoble*, 51 Minn. 358, 53 N. W. 805; *King v. Connolly*, 51 Cal. 181; *Langley v. Ross*, 55 Mich. 163, 20 N. W. 886.) The discussion heretofore indicated as to the covenant in this lease relative to the fitness of the premises is sustained by *Wolfe v. Arrot*, 109 Pa. St. 473, 1 Atl. 333. The offer to prove the circumstances surrounding the execution of this lease, the relation of the parties, each to the other, and to the subject matter of the lease, the representations at the time of the execution of the contract, and the offer of the written document shown, were proper. (*Mayer v. Goldberg et al.*, 116 Wis. 96, 92 N. W. 556 (court is required, etc.); *Chicago R. I. & P. Ry. Co. v. Denver & R. G.*, 143 U. S. 596, 12 Sup. Ct. Rep. 479, 36 L. ed. 277; *Winona & St. Paul L. Co. v. Minnesota*, 159 U. S. 531, 16 Sup. Ct. Rep. 83, 40 L. ed. 247.) The construction of the instrument, as given by Porter heretofore set out, to the effect that "cold storage building" was an expression used to call for and require a frost-proof building, was not denied; that shows the construction which the parties placed on this document. This controls in cases of this kind. In addition, the discussion heretofore has amply shown that the parties intended this building should be a frost-proof building. (Top-

Argument for Respondent.

Cliff v. Topcliff, 122 U. S. 121, 7 Sup. Ct. Rep. 1057, 30 L. ed. 1110.) The true intention of the parties controls. (*Home of the Friendless v. Rouse*, 8 Wall. 437, 19 L. ed. 495; *Porter v. Allen*, 8 Idaho, 358, 69 Pac. 105.) Hunter undertook to do what the lease called upon him to do, i. e., to "complete" the construction of the building so it would be fit for use as a storage house. Not having done so, he is liable for the loss which followed, which was attributable to his failure to perform the plain requirements of the contract. (*Swift v. East Waterloo Hotel Co.*, 40 Iowa, 322; *McCoy v. Oldham*, 1 Ind. App. 372, 50 Am. St. Rep. 208, 27 N. E. 647; *Culver v. Hill*, 68 Ala. 66, 44 Am. Rep. 134; *Young v. Collett*, 63 Mich. 331, 29 N. W. 850; *Bentley v. Taylor*, 81 Iowa, 306, 47 N. W. 59, 9 L. R. A. 772; *Vaughan v. Matlock*, 23 Ark. 9; *Tyler v. Disbrow*, 40 Mich. 415; *Lane v. Pacific & I. N. Ry. Co.*, 8 Idaho, 230, 67 Pac. 566; *La Farge v. Mansfield*, 31 Barb. 345.)

Forney & Moore and G. W. Suppiger, for Respondent.

The failure of the appellant to comply with the written demand to pay rent or surrender possession of the premises for a period of three days after service of the written demand operated as a forfeiture of the estate of the tenant. (Rev. Stats. 1887, secs. 5093, 5106; *Brummagim v. Spencer*, 29 Cal. 662.) The pleading of the appellant designated a "cross-complaint" is a counterclaim, under the statutes, the same being an alleged cause of action existing in favor of the appellant, who was defendant below, and against the respondent, who was plaintiff below. (*Stevens et al. v. Home Savings etc. Assn.*, 5 Idaho, 741, 51 Pac. 986.) This being a special proceeding for the summary possession of real property, the counterclaim set up in appellant's alleged cross-complaint is not permissible. (*Moroney v. Hellings*, 110 Cal. 219, 42 Pac. 560; *Kelly v. Teague*, 63 Cal. 68; *Van Every v. Ogg*, 59 Cal. 563; *Warburton v. Doble*, 38 Cal. 619; *Phillips v. Lodge No. 6, F. & A. M.*, 8 Wash. 529, 36 Pac. 476; *Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760; *McSloy v. Ryan*, 27 Mich. (Cooley) 109.) Even if the description of the building contained in the lease should be held to be a warranty of the fitness of the build-

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ing demised, and if, before storing apples therein, the building was known, by the appellant, to be unfit for the storage of apples, and the appellant proceeded to store his apples therein and suffered loss by reason of the unfitness of the building, he is guilty of contributory negligence and cannot recover, or at least the law of avoidable consequences should apply. (1 Sedgwick on Damages, sec. 209.) This brings us to a consideration of a proposition of law which, in our opinion, is decisive of quite, if not all, of the errors assigned by the appellant. Our laws relating to unlawful detainer were taken from the statutes of California, and while the California statutes relating to this subject that have been construed by the court in the citations to follow have not been couched in the same language, they were identical in scope, object and intent. In the case of *Warburton v. Doble*, 38 Cal. 619, the supreme court of California in 1869, through Mr. Justice Rhodes, said: "A setoff or counterclaim is not admissible in actions of this class, and it makes no difference whether it be a demand for money or a previous forcible entry of the plaintiff." This action was in forcible entry and detainer, but was prosecuted under the same summary proceedings for the possession of the property that the respondent prosecuted the case at bar in the lower court. (*Kelly v. Teague*, 63 Cal. 68; *Borden v. Sackett*, 113 Mass. 214; *Moroney v. Hellings*, 110 Cal. 219, 42 Pac. 560.)

AILSHIE, J.—On the twenty-third day of August, 1901, the plaintiff and defendant entered into a written agreement of lease, whereby the plaintiff let to the defendant a cold storage building in the city of Kendrick, Latah county, for a period of one year. It was agreed that in addition to doing certain work and making certain improvements the lessee should pay the sum of \$300 as rental for the premises; \$100 to be paid on or before the fifteenth day of September, 1901, and \$200 on or before the fifteenth day of January, 1902. Defendant, the lessee, entered into possession of the premises and paid the first installment of rent but failed to make the payment which fell due January 15, 1902. After the defendant made default in the payment of rent, and on the eighteenth day of January,

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1902, the plaintiff served notice on him, under the provisions of subdivision 2 of section 5093 and section 5094, Revised Statutes, requiring defendant to pay the rent due or surrender possession of the premises. The defendant neglected and refused to pay the rent or to deliver the possession of the premises, and on the twenty-fourth day of April, 1902, the plaintiff commenced his action in the district court in and for Latah county, alleging his cause of action in the usual form, charging the defendant with an unlawful detainer of the property and premises after default in payment of rent and the service of the statutory notice for the payment of the same or delivery of possession. The defendant answered this complaint setting up as an exhibit a copy of the lease and specially pleading certain covenants and options therein contained, and, after pleading several separate defenses, filed a cross-complaint alleging that the plaintiff had violated and broken various of his covenants with reference to the construction and condition of the premises demised, and that by reason thereof the defendant, lessee, had sustained damages in the aggregate amount of \$2,050, and prayed judgment against the plaintiff for that sum. The case went to trial and the evidence was introduced both on the part of the plaintiff and defendant, and findings of fact and conclusions of law were made and filed, finding that the defendant was guilty of unlawful detainer, and also finding against him on all the allegations of his cross-complaint. Thereupon judgment was entered in the usual form for the rents and damages and for cancellation of the lease and the restoration of the plaintiff to the possession of his premises.

Defendant prepared and had settled his statement and bill of exceptions and thereafter moved for a new trial, and has appealed from the judgment and the order denying his motion for a new trial.

In the first place it is contended that the notice served by plaintiff upon defendant for the payment of rent or delivery of possession is not a sufficient notice under sections 5093 and 5094, Revised Statutes. We have carefully examined the notice and compared it with the requirements of those provisions, and are satisfied from such examination that it is a sufficient and substantial compliance therewith. The notice is as follows:

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"To L. A. Porter, Tenant in Possession:

"You are hereby required to pay the rent of the premises hereinafter described, and which you now hold possession of, amounting to the sum of two hundred dollars, being the amount now due and owing to me by you as the balance of the rent due for the term from the first day of September, A. D. 1901, until the first day of September, 1902, or deliver up possession of the same to me, or I shall institute legal proceedings against you to recover possession of said premises, with treble rent.

"Said premises are situated in the Town of Kendrick, Latah County, Idaho, and are described as follows:

"All that certain brick storage house situate in block B, Addison's addition to the town of Kendrick, Idaho, designated and known as 'Hunter's Cold Storage.'

"Dated at Kendrick, Idaho, January 18, A. D. 1902.

"Respectfully,

(Signed) "LEWIS HUNTER."

The next and most serious contention urged by appellant is that this action could not be maintained under the express terms of the lease and the statutes applicable thereto until a thirty days' notice had first been given notifying the tenant of the lessor's intention to exercise his option to terminate such lease, and thereafter, and upon the expiration of the thirty days' notice, the service of a further notice of three days to quit and surrender the premises. This position rests upon the following provision found in the lease: "And it is further covenanted that if said payments of rent or either of them, whether the same be demanded or not, are not paid when they come due, or if said leased premises be appropriated to any other purpose or use than as herein specified, except by written consent, or waste of any kind shall be made or committed thereon, or if any part of said demised premises be underlet without the consent of the said first party, as herein provided, or if this lease assigned by act of the said second party or by operation of law, or if said party of the second part shall fail or neglect to perform any of the covenants by him to be kept and performed, then said party of the first part shall have the right, at his option (and such right is hereby expressly reserved by him) to termin-

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ate said lease, and any and all rights, interest or estate the said party of the second part may have in or to said premises or any portion thereof, by giving said lease or the occupant of said premises thirty days' notice in writing, signed by the first party or his agent, or attorney of his intention to so terminate said lease."

It is argued by the appellant that since the lessor has never served a thirty days' notice in the exercise of this option to terminate the lease and has in fact never terminated the lease under that option reserved to himself in the lease, that the tenant was therefore in possession by the permission of his landlord; and that the service of the thirty days' notice could not operate as a withdrawal of such permission and convert him into an unlawful detainer. The respondent, on the other hand, urges that this stipulation did not take from the landlord his right to pursue the statutory remedy in case of a default in payment of rent, and that even though the tenant failed to pay the rent when due, the landlord was not obliged to exercise his option to *terminate* the lease unless he should see fit so to do. In other words, he contends that the lessor might pursue the statutory remedy and leave the lessee to the exercise of his statutory privilege of paying the rent due and thereby saving the lease from lapse or forfeiture. Plaintiff contends that if he chose not to exercise his option and to be more lenient in this respect toward the lessee than he might have been, that the lessee had no right of complaint.

We are unable to see wherein this stipulation is in any way violated by the landlord pursuing his statutory remedy as he has done in this case. In such a proceeding as this it is not contended that the lease is terminated, and it is not upon that theory that such an action founded upon failure to pay rent is prosecuted. Here the landlord seeks primarily to secure payment of the rent due, and, as an alternative, in case the rent is not paid, to secure possession of the premises. The law has provided that the tenant cannot retain the rental value of the premises and also the possession of the premises after completion of the service of the statutory notice. It should be observed that the stipulation over which this controversy arose

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was not a stipulation extending the time for payment of rent, neither does it grant to the tenant any immunity from the payment thereof. It simply gives to the lessor the right, upon breach of any of the covenants on the part of the lessee, to absolutely terminate the lease, but provides that in case he shall choose to exercise this option, he shall give a thirty days' notice of such election. This is presumably for the purpose of giving the tenant an opportunity to secure other premises, and in the event of the exercise of such option the tenancy would not be terminated until the expiration of the thirty days, and the tenant would not be an unlawful detainer until a further notice of three days should be served upon him requiring him to vacate. We think the plaintiff pursued the proper remedy in this case.

The other questions argued upon this appeal present to our minds an unusual and novel situation in the matter of practice and procedure; and this is accentuated by the fact that the party who urges them is the lessee. No objection was made by the plaintiff in the lower court to the consideration of the cross-complaint, nor was any question raised as to defendant's right to introduce his evidence in support thereof. The plaintiff, however, succeeded upon the trial as to all the issues raised and defendant has appealed. In this court the plaintiff, who is respondent here, argues as one of the reasons why the judgment should be sustained that under the statute and decisions of the courts the defendant had no right to be heard either upon a counterclaim or cross-complaint in the lower court, and that therefore whatever error might have been committed against the defendant in the introduction of evidence on his cross-complaint or as to the findings of the court thereon, cannot become grounds of reversal in this court. The appellant has neither raised nor argued the point in this court that the plaintiff in the lower court having neglected to present these objections there, cannot be heard to urge them here. If the plaintiff had lost in the lower court and were the appellant here we should certainly not permit him to raise this question for the first time in this court on appeal; and, indeed, if the consideration of that issue here could result in prejudicing the defendant in any manner.

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upon his appeal we would not consider it as here presented. Entertaining, however, the view we do of this case, we are of the opinion that it is our duty to consider and pass upon the defendant's right to be heard upon his cross-complaint. If after an examination of the many errors assigned by appellant both as to the construction of the lessor's covenants contained in the lease and the introduction of evidence upon the cross-complaint, we should find error and reverse the judgment and remand the case for a new trial, this question might then be raised by the plaintiff and the defendant would be in a worse position upon a new trial than he will be after our having settled this issue.

Chapter 4 of title 3 of the Code of Civil Procedure, Revised Statutes of 1887, treats exclusively of forcible entry and unlawful detainer and the remedies therefor. The title to that chapter is: "Summary Proceedings for Obtaining Possession of Real Property." A study of the various provisions of this chapter of nineteen sections satisfies us that it was the purpose of the legislature to provide a summary method whereby a landlord might collect his rent, or, in default thereof, obtain possession of his property. The statute requires that both the complaint and the answer shall be verified, and section 5102 provides that "If, at the time appointed, the defendant do not appear and *defend*, the court must enter his default and render judgment in favor of the plaintiff as prayed for in the complaint." This section seems to only contemplate a defense to the charge of forcible or unlawful detainer and does not appear to provide for the defendant seeking affirmative relief or becoming a cross-actor in such action. Section 5106 provides the character of judgment that may be entered and the manner and method of enforcing the same; and every provision of that section looks to the trial of only one issue, namely, whether the defendant is either a forcible or unlawful detainer of the premises. To allow the issue of unliquidated damages growing out of an independent covenant contained in the lease and made by the lessor to be set up either by way of cross-complaint or counterclaim in such an action would frustrate the purposes and object of the statute, and, at the same time, give the tenant

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an advantage over the landlord in that he would be allowed to both retain the premises and the rental value thereof while litigating with his landlord a minor issue as to some real or fancied grievance which he might never be able to establish in court. If a defense of this kind could be maintained, a landlord would never know how much rent was due him or how much he could safely demand. In other words, so soon as his tenant began to complain of some real or imaginary grievance growing out of the terms of the lease, the landlord would be unable to say how much was due him on rents from his tenant until a court had passed upon the tenant's claim for damages. Such a claim could generally be expected to appear as an issue in the case. This question has been frequently considered by the courts, and in one of the late authorities on the subject—*Phillips v. Port Townsend Lodge No. 6, F. & A. M.*, 8 Wash. 529, 36 Pac. 476—the supreme court of Washington say: "The very object the legislature had in view in enacting the statute under which the appellants were proceeding was to afford a summary and adequate remedy for obtaining possession of premises withheld by tenants in violation of the covenants of their lease, and this object would be entirely frustrated if tenants were permitted to interpose every defense usual or permissible in ordinary actions at law. The statute prescribes that a tenant is guilty of unlawful detainer after default in the payment of rent pursuant to the lease or agreement under which the property is held, and three days' notice in writing requiring its payment, or possession of the property, shall have been served upon him (Laws 1891, p. 180); and, when these facts are made to appear to the satisfaction of the court or jury upon the trial, the landlord is entitled to judgment for restitution of the premises, and also to judgment declaring the forfeiture of such lease or agreement, together with damages and the rent found due. In such proceedings counterclaims and offsets are not available."

In *Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 763, the same court said: "We have been cited to no cases holding that, in an action for an unlawful detainer, a counterclaim or setoff is admissible. On the contrary, the courts seem to entertain the oppo-

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site doctrine generally, and lay down the rule that no such defense can be interposed."

These cases have both been approved and followed in *Owens v. Swanton*, 25 Wash. 112, 65 Pac. 921, and *Carmack v. Drum*, 27 Wash. 382, 67 Pac. 808. In *Owens v. Swanton* the supreme court approved the action of the trial court in sustaining a demurrer to a cross-complaint in a similar case. The same doctrine seems to have been maintained in California by a uniform line of authorities from *Warburton v. Doble*, 38 Cal. 619, down to *Moroney v. Hellings*, 110 Cal. 219, 42 Pac. 560. In *McSloy v. Ryan*, 27 Mich. 109, Judge Cooley says: "The defendant offered evidence to show that complainant had not performed his covenants in the lease in regard to improvements and repair. As these covenants were independent of the covenant to pay rent, and this proceeding was not one in which, even if the amount of rent was in issue, there could be any deduction of offsets, or by way of recoupment, the court did not err in rejecting this evidence."

Appellant contends that under sections 4183 and 4184, Revised Statutes, *Stevens v. Home Savings etc. Assn.*, 5 Idaho, 741, 51 Pac. 779, 986, and *Murphy v. Russell*, 8 Idaho, 151, 67 Pac. 427, it was not only his legal right, but his duty, to present his cross-complaint in this case, and have it litigated in this action, and that by failure to do so he would have lost his remedy. He also admits that, in an action of this kind, there cannot properly be any counterclaim. In his reply brief he says: "The matters set forth in the cross-complaint are not counterclaims. What claim is it possible to 'counter' against an unlawful act of any nature—whether it be an 'unlawful' detainer, an 'unlawful' assault, an 'unlawful' battery, an 'unlawful' attempt to murder, an 'unlawful' libel or slander? It is readily seen that it is absolutely impossible to have a counterclaim to an unlawful act, hence the matters set up in the cross-complaint are not counterclaims."

In this case where there was only one plaintiff and one defendant, if the facts here pleaded could not be set up by way of counterclaim, we fail to see how the same facts could be pleaded by calling them a cross-complaint. The scope of plead-

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ing for a cross-complaint under section 4188 is not as comprehensive as for a counterclaim under section 4184. A cross-complaint under section 4188 must relate to or depend upon the contract or transaction on which the main case is founded, or affect the property to which the action relates, but does not necessarily seek its relief against all or any of the original plaintiffs or defendants. On the other hand, a counterclaim, while it must exist in favor of the defendant and against the plaintiff or plaintiffs, may go further, and, if the cause of action arose on contract, may set forth any other cause of action arising on contract as a counterclaim thereto. As to subject matter, the counterclaim is the more comprehensive and liberal, but for relief against individual plaintiffs or defendants or bringing in new parties against whom a defendant claims relief growing out of the subject matter of the action, the cross-complaint is the available procedure. (See *Stevens v. Home Sav. etc. Assn.*, *supra*.)

Aside from the fact that the legislature have provided by the unlawful detainer act a summary remedy which they did not mean to be subject to the same defenses, counterclaims and cross-actions as ordinary litigation, such a defense as the one here interposed does not, strictly speaking, "arise out of the transaction set forth in the complaint." A tenant does not become primarily an unlawful detainer upon breach of the covenant in the lease to pay rent, but rather upon failure to pay after demand by a legal notice in the statutory time. This constitutes him "an unlawful detainer" of the premises; this he would never become but for service of the notice, although he should never pay rent. Indeed, the landlord might forego this remedy and maintain his action on the contract for the payment of rent. It cannot truly be said that a breach of a covenant by the landlord to improve or repair the demised premises arises out of or is connected with a failure to pay rent after service of notice to pay or surrender possession. A breach of a covenant made by the landlord does not result in making him guilty of an "unlawful" act in the same sense that a tenant becomes guilty of "unlawful detainer" upon failure to pay rent after notice. A claim for unliquidated damages arising out of

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a breach of a covenant on the part of the lessor is neither a proper matter for counterclaim nor cross-complaint as authorized by sections 4184 and 4188. The matters set up by defendant's cross-complaint were not proper matters to be litigated in the case, and the findings and conclusions of the trial court thereon will not preclude the defendant from litigating any such claim as he may have for damages in an independent action.

The lease pleaded by the cross-complaint was for a "cold storage" building in the town of Kendrick, which was in course of construction at the time the lease was executed, and was to be completed in "as short time as possible" thereafter. The premises were described as "The cold storage building now in course of construction, on lots 1 and 2 of block 'B' in Addison's addition to the town of Kendrick, Idaho, and known as the Hunter Cold Storage House." The lease also contains this provision: "The party of the second part agrees that he will use said cold storage building only for the purpose of handling fruit and produce, and not for hay, grain or feed." Appellant maintains that these various designations and references to the demised premises as a "cold storage building," read in connection with the stipulation that the premises should not be used by the tenant except for the handling of fruit and produce, from which hay, grain and feed were excluded, is an implied warranty that the building when completed should be such a structure as would be suitable for the storage and preservation of fruits at all times during the year for which it was let. We are of the opinion that the appellant is correct in this contention. It is clear to us from an examination of the instrument itself that the lessor knew and understood the purpose for which the lessee was securing the premises; and not only that, but by the terms of his lease he restricted and confined the lessee to the use of the premises for those purposes only. At the time this agreement of lease was entered into the building was not completed, and was therefore not in a condition that the tenant could enter and examine the same to ascertain whether it met all the requirements for which he was leasing it. On the other hand, the landlord by the implied terms of the lease represented the

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building as a "cold storage building," and that term must be understood to have a meaning peculiar to a class or kind of building designed for the preservation and safekeeping of such articles and products as it was understood that the tenant meant to keep in the building. (*Vaughn v. Mailack*, 23 Ark. 12; *Jordan v. Dyer*, 34 Vt. 104, 80 Am. Dec. 668; *Allen v. Somers*, 73 Conn. 355, 84 Am. St. Rep. 158, 47 Atl. 653, 52 L. R. A. 106; *Railroad Co. v. Smith*, 21 Wall. 255, 22 L. ed. 513; *Lane v. Pacific & I. N. Ry. Co.*, 8 Idaho, 230, 67 Pac. 656; *Porter v. Allen*, 8 Idaho, 358, 69 Pac. 105; *Wolfe v. Arrott*, 109 Pa. St. 473, 1 Atl. 333; *Young v. Collett*, 63 Mich. 331, 29 N. W. 850.)

This was more than a location and designation of the property and amounted to a representation as to its character.

The judgment for rents and costs and possession of the property described therein will be affirmed and the defendant will not be barred by the findings of the trial court from litigating, in an independent action, any claim he may have for damages. Under all the facts and circumstances of this case as disclosed by the record, each party will be required to pay one-half of the total costs incurred by reason of this appeal.

Sullivan, C. J., and Stockslager, J., concur.

ON PETITION FOR REHEARING.

(July 8, 1904.)

HUNTER v. PORTER.

[77 Pac. 439.]

LAW OF THE CASE.

1. The doctrine of "law of the case" extends only to the questions presented and distinctly passed upon on the former appeal.

(Syllabus by the court.)

Per CURIAM.—We devoted a great deal of time to an examination and investigation of the questions involved in this case before the writing of the original opinion, but the evident

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time and labor counsel for appellant has given to the preparation of a petition has induced us to again consider the matters complained of in the petition. Such further examination and discussion convinces us of the correctness of the conclusion first reached. Complaint is made in the petition that the principal point decided was upon an error committed in appellant's favor rather than against him. This is only partially true. Upon consideration of the case we found that the judgment against defendant on plaintiff's allegation of unlawful detainer was sustained by the evidence and was properly rendered and entered; at the same time we found that error was committed against defendant wherein the court found that the lease contained no implied covenant of fitness of the demised premises. Entertaining these views we could not reverse the judgment in unlawful detainer against defendant. To grant a new trial upon defendant's cross-complaint and the answers thereto would afford him no more relief than we have granted him. Since the case was not properly tried in the first instance on a cross-complaint or counterclaim, it could not properly be so tried upon a *new trial*. Counsel complains of the following sentence contained in the opinion: "If after an examination of the many errors assigned by appellant both as to the constructions of the lessor's covenants contained in the lease and the introduction of evidence upon the cross-complaint, we should find error and reverse the judgment and remand the case for a new trial, this question might then be raised by the plaintiff, and the defendant would be in a worse position than he will be after our having settled this issue." That language was intentionally used and expresses our view. When a new trial is granted it is done for all purposes. A party who seeks and obtains a new trial cannot avail himself of the chance of gaining more without incurring the hazard of getting less than upon the former trial. This is true as to all questions of both law and fact not directly passed upon by the appellate court on the appeal. The doctrine of "law of the case" extends only to the questions squarely presented and distinctly passed upon on the former appeal. (*Hall v. Blackman*, 9 Idaho, 555, 75 Pac. 608; *McKinley v. Tuttle*, 42 Cal. 571; *Klau-*

Points decided.

ber v. San Diego St. Car Co., 98 Cal. 105, 32 Pac. 876; 2 Ency. of Pl. & Pr. 379.) The appellate court has no power or authority to direct the action of a trial court upon any matters not before the appellate court on the appeal.

With these principles in view, suppose we should not pass upon the question of filing a counterclaim and cross-complaint in a case like this, and send the case back for a new trial and the question should then be raised; upon what theory could it be said that the law of the case has been settled as to that question? None, we apprehend. For this reason, and entertaining the view we do of the law as to the counterclaims in such case, we were entirely correct in saying defendant would be in a worse position for us to reverse the case and send it back without deciding this question than he is after we have decided it upon this appeal.

The other questions presented by the petition are disposed of by the original opinion.

The petition is denied.

(June 2, 1904.)

STATE v. CREA.

[76 Pac. 1013.]

INFORMATION—INDORSING NAMES OF WITNESSES THEREON—JUROR—PEREMPTORY CHALLENGE—READING INDICTMENT TO JURY—IMPEACHMENT OF WITNESS—PHYSICAL STRENGTH OF DEFENDANT AND DECEASED—RETREAT—PREJUDICE OF WITNESS—EXHIBITS TAKEN TO JURYROOM—INSTRUCTIONS.

1. Under the provisions of section 2, Laws Fifth Session, 1889, page 125, requiring the prosecuting attorney to indorse on the information the names of all witnesses known to him at the time of filing the same, and it is sought to have the names of other witnesses indorsed on the information after the same has been filed, the court must be satisfied that the names of such witnesses were not known to the prosecuting attorney at the time the information was filed before such names are allowed to be indorsed thereon.

Points decided.

2. The court may, in its sound discretion, permit the prosecuting attorney to exercise his right of peremptory challenge of a juror at any time previous to the time the jury is sworn to try the case, the object and purpose being to secure a fair and impartial jury.

3. It is not error for the court to permit the witnesses to be sworn in a body.

4. Under the provisions of section 7855, Revised Statutes, a failure by the clerk to read the indictment or information and state the plea of the defendant to the jury is reversible error.

5. Under the provisions of section 6063, Revised Statutes, a witness may be impeached by evidence showing that he has made at other times statements inconsistent with his present testimony, and such statements must not only be relevant to the issue, but must be of matters of fact and not simply the opinion of the witness based on facts.

6. Where the defendant seeks to show the superior physical strength of the deceased when compared with his own, the evidence should be confined to the strength of each at the time of the homicide.

7. It was error to reject evidence tending to show that the defendant was behind the bar in a saloon and could not retreat out of reach of the deceased to escape his attack.

8. It is error to reject any evidence showing or tending to show the bias or prejudice of the witness either for or against the defendant.

9. On the direct examination of a witness called to testify to the reputation of the deceased as to peace and quietude, it is not proper, over the objection of the defendant, to inquire into the relation that existed between the witness and deceased.

10. Under the provisions of section 7902 of the Revised Statutes, it is error to permit, over the objection of the defendant, the jury to take to their juryroom any exhibits except such papers as are specified in said section.

11. It was error to instruct the jury that "if the evidence shows an unlawful killing, then in order for such unlawful killing to be manslaughter and not murder, there must have been shown by the evidence to have been a serious and highly provoking injury inflicted upon the person killing, . . . or an attempt by the person killed to commit a serious injury on the person killing," as the language there used under the provisions of section 6570, Revised Statutes, would be justifiable homicide and not manslaughter.

(Syllabus by the court.)

APPEAL from District Court of Idaho County. Honorable E. C. Steele, Judge.

Argument for Appellant.

Defendant charged with murder; convicted of manslaughter. Reversed.

Miles S. Johnson and A. S. Hardy, for Appellant.

Before and after the commencement and during the progress of the trial the court permitted the prosecuting attorney to indorse the name of witnesses upon the information without an affidavit being filed, or any statement made that the said witnesses were unknown to the prosecuting attorney prior to the leave being asked, or any statement made as to what was expected to be proven by said witnesses. (Laws 1899, p. 125, sec. 2; *People v. Hall*, 48 Mich. 482, 42 Am. Rep. 477, 12 N. W. 665; *State v. Wilbusse*, 8 Idaho, 608, 70 Pac. 849.) We submit that when a peremptory challenge is waived it is gone, and to allow the state to peremptorily challenge a juror after it has waived its last peremptory, is equivalent to giving the state six peremptories. "It is error to allow the state to peremptorily challenge a juror after he is tendered to the prisoner or to allow the state more peremptories than allowed by law." (*State v. Fuller*, 114 N. C. 885, 19 S. E. 797; *State v. Cameron* (Wis.), 2 Pinn. 496; *Gravelly v. State*, 45 Neb. 878, 64 N. W. 452; *State v. Haines*, 36 S. C. 504, 15 S. E. 556; *Williams v. State*, 63 Ark. 527, 39 S. W. 709; *Wiggins v. Commonwealth*, 20 Ky. Law Rep. 908, 47 S. W. 1073; *Vance v. Richardson*, 110 Cal. 414, 42 Pac. 909.) The information was not read to the jury or the plea stated at any time during the progress of the trial. (See Rev. Stats., sec. 7855, subd. 1.) "If the indictment is for a felony the clerk *must* read it and state the plea of the defendant to the jury. In all other cases this formality may be dispensed with." "Criminal Code Practice, section 219, requiring the indictment to be read to the jury, is mandatory, and a total failure to comply with the requirement is reversible error." (*Farris v. Commonwealth* (Ky.), 63 S. W. 615; *Hendrickson v. Commonwealth*, 23 Ky. Law Rep. 1191, 64 S. W. 954; *State v. Chambers*, 9 Idaho, 673, 75 Pac. 275.) "It is plain that every statutory provision intended for the benefit of the accused confers a substantial right which cannot be disregarded without his consent." (*People v. McQuade*, 110

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N. Y. 284, 18 N. E. 156, 1 L. R. A. 273.) It is a general rule that a witness cannot be impeached on an immaterial or collateral matter. (*People v. Tiley*, 84 Cal. 651, 24 Pac. 290; *People v. Furtado*, 57 Cal. 345; *People v. McKeller*, 53 Cal. 65; *People v. Bell*, 53 Cal. 119; *People v. Dys*, 75 Cal. 108, 16 Pac. 537; *State v. Irwin*, 9 Idaho, 35, 71 Pac. 608; 29 Am. & Eng. Ency. of Law, p. 793; *People v. Collum*, 122 Cal. 186, 54 Pac. 589; *People v. Cole*, 127 Cal. 545, 59 Pac. 984; *People v. Webb*, 70 Cal. 120, 11 Pac. 509; Wharton's Criminal Evidence, 484.) Nor can the witness' former opinion in relation to the matter in issue be shown unless it is a matter upon which the opinion of a witness is admissible in evidence. (29 Am. & Eng. Ency. of Law, p. 796; 1 Thompson on Trials, sec. 493; *Commonwealth v. Mooney*, 110 Mass. 99; Wharton's Criminal Evidence, 482.) The test as to whether a matter is collateral within the meaning of the rule is this: that the cross-examining party be entitled to prove it in support of his case. (29 Am. & Eng. Ency. of Law, p. 794; Wharton's Criminal Evidence, 484.) It is a matter of vital importance in a plea of self-defense to show the comparative strength of the two men. (21 Am. & Eng. Ency. of Law, 2d ed., p. 228.) The testimony in this case showed that McLeod had been in "boxing bouts," and was a very large and powerful man, and an assault and battery by a powerful man with his fists upon a weaker man might produce great bodily injury. (*State v. Gray*, 43 Or. 446, 74 Pac. 929; *Rogers v. State*, 60 Ark. 76, 46 Am. St. Rep. 154, 29 S. W. 894, 31 L. R. A. 465.) It will be seen that *papers* are the only exhibits which a jury are allowed to take with them to their juryroom and the defendant's discharge was the *only paper* in evidence. (Rev. Stats., sec. 7902.) Under the same statute the supreme court of Oklahoma, in the case of *Hansing v. Territory*, 4 Okla. 413, 46 Pac. 509, held that it was error for the trial court to permit the jury to take with them to the juryroom, and to have the same in their possession while deliberating, the Winchester rifle used by defendant, and the revolver used by his codefendant, and the hat worn by deceased at the time of the affray, with the bullet holes in it. "Serious bodily injury" is substantially

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equivalent to "great bodily harm." (*Lawlor v. People*, 74 Ill. 228; *Rogers v. State*, 60 Ark. 76, 46 Am. St. Rep. 154, 29 S. W. 894, 31 L. R. A. 465.) This instruction also takes away from the defendant the right of acting upon appearances. (*State v. Gray*, 43 Or. 446, 74 Pac. 929; *State v. Rolla*, 21 Mont. 582, 55 Pac. 523; *State v. Sloan*, 22 Mont. 293, 56 Pac. 364.) It is held that when conflicting propositions of law are given upon a material point, one correct and the other incorrect, the judgment will be reversed. (*Axtell v. Northern Pac. Ry. Co.*, 9 Idaho, 392, 74 Pac. 1075; *Claire v. People*, 9 Colo. 122, 10 Pac. 799.)

Attorney General John A. Bagley, E. M. Griffith and Clay McNamee, for Respondent.

SULLIVAN, C. J.—The defendant was convicted of the crime of manslaughter. The information on which he was tried and convicted charged him with murder of one Thomas V. McLeod on the eleventh day of January, 1902, by shooting said deceased. The jury found the defendant guilty of manslaughter, and the judgment of the court was that the defendant serve a term of four years and ten months in the state penitentiary at hard labor. Sixty-four errors are assigned and a new trial demanded. Counsel for appellant discuss first in their brief assignments of error numbers 2, 15, 26, 33 and 63. These all refer to the action of the court in ordering the names of certain witnesses to be indorsed upon the information. The record shows that the names of several witnesses were, on the motion of the prosecuting attorney, indorsed on the information, and that no reason was shown to the court why said names had not, and could not have, been indorsed thereon at the time said information was filed. Section 2 of an act entitled "An act to provide for prosecuting offenses on information, and to dispense with the calling of grand juries, except by order of the district judges," approved February 6, 1899, Session Laws of 1899, page 125, is as follows:

"All information shall be filed during term, in the court having jurisdiction of the offense specified therein, by the district attorney as informant; he shall subscribe his name there-

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to and indorse thereon the names of the witnesses known to him at the time of filing the same; and at such time before the trial of any case as the court may by rule or otherwise prescribe, he shall indorse thereon the names of such other witnesses as shall then be known to him."

Said section provides, among other things, that the prosecuting attorney must indorse on the information the names of the witnesses known to him at the time of filing the same. It also provides that other names may be indorsed thereon as the court may by rule or otherwise prescribe. Under the latter provision, before the court allows the name of a witness to be indorsed thereon, some showing should be made by affidavit or otherwise why it was not indorsed thereon at the time of filing the information.

This court held in *State v. Wilmbuss*, 8 Idaho 46, 20 Pac. 849, that the court did not err in permitting the names of witnesses unknown to the prosecuting attorney at the time the information was filed to be thereafter indorsed thereon. The showing in that case was made by affidavit. Where the prosecuting attorney seeks to have the names of witnesses indorsed on the information, after the same has been filed, before permitting the same the court must be satisfied that the names of such witnesses were not known to the prosecuting attorney at the time the information was filed. (*State v. McGonn*, 8 Idaho, 40, 66 Pac. 823.)

Assignment No. 3 goes to the action of the court in impaneling the jury. It appears from the record that the state and the defendant had passed the jury for cause, the state having used four peremptory challenges. The court thereupon announced that it was the state's fifth and last peremptory challenge, whereupon counsel for the state announced that the state waived its fifth peremptory. A recess was then taken for ten minutes. After recess counsel for defendant stated that the defendant accepted the jury. The court thereupon stated as follows: "At the recess the state notified the court that it desired to withdraw the passing of the jury; the court for the purpose of informing the other side notified the defendant's attorneys that they would have the right to do this.

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The court will let them withdraw waiving of challenge before steps are taken to”

Counsel for defendant thereupon excepted to the action of the court. Thereupon counsel for state further examined juror Pefley and peremptorily challenged him, which challenge was granted by the court. The above action of the court is assigned as error. It appears from the above record that at the time the state waived its fifth peremptory challenge, the court took a recess, and during that time the fact had been communicated to the court that the state desired to withdraw its waiver of its fifth peremptory challenge and that the judge informed counsel for the defendant of that fact. Immediately on the convening of the court after recess, counsel for the defendant stated that the defendant accepted the jury. We think on that state of facts it was not error for the court to permit counsel for the state to further examine the jury; for until the jury is accepted and sworn, we think it is in the sound discretion of the court to permit either the state or the defendant to further examine the jurors. The object of the court should be to get a fair and impartial jury, and it has been held by very respectable authority that the court has discretion to permit the withdrawal of an inadvertent acceptance by a party and the interposition of a challenge, and that if the disqualifications were not previously known, it was error to refuse to allow a challenge offered after acceptance if made before the juror is sworn. (Am. & Eng. Ency. of Law, 2d ed., p. 1160, and notes.)

Assignment No. 31 refers to a question asked witness Kinkaid, who was called to testify in behalf of the state, as to the character of the deceased for peace and quietude. On his direct examination he was asked the following question: “What, if any, relation existed between him and you as a miner as to employment?” To which question the defendant objected on the ground that it was incompetent, irrelevant and immaterial and not in rebuttal. The objection was overruled by the court. While that question would have been proper on cross-examination, it was not competent on the direct examination. It was sufficient on direct examination to ask the witness if he knew

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the reputation of the deceased for peace and quietude; if his answer was "yes," then would follow the question as to what it was. On cross-examination the relations existing between the witness and the deceased might be gone into, but on the direct examination that could not properly be done.

It is not necessary for us to pass upon the fourth error assigned. The question there involved will not, in all probability, be raised upon a retrial in this case.

The fifth error assigned is that the court erred in permitting the witnesses to be sworn in a body. There is nothing in this contention, as it is not shown that anyone testified in the case who had not been sworn.

It appears from the record that the information was not read to the jury and the plea of the defendant stated to them at the opening of the trial, and that omission is assigned as error. Section 7855 of the Revised Statutes provides that "The jury having been impaneled and sworn, the trial *must* proceed in the following order: 1. If the indictment is for a felony, the clerk must read it and state the plea of the defendant to the jury. . . . 2. The district attorney or other counsel for the people must open the cause and offer the evidence in support of the indictment."

By the provisions of that section the legislature has laid down the order of trial in a criminal case, and it provides that after the jury has been impaneled, if the indictment be for a felony the clerk must read it to the jury and state the plea of the defendant to them. Said provisions are too plain and obvious to require construction; and this court held in *State v. Chambers*, 9 Idaho, 673, 75 Pac. 275, that said provisions were mandatory, and the omission to read the information and state the plea of the defendant to the jury was reversible error. The omission to read the information and state the plea of the defendant to the jury was gross carelessness on the part of the prosecuting officer, as a new trial must be granted and much additional costs will be incurred in a retrial of this action.

Witness McKinley was asked the following question: "State what was his condition, dead or alive?" and answered, "Dead, I presume." Counsel for defendant moved to strike out the

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answer, which was denied by the court. That action of the court was not error, as there is ample evidence in the record to show that the deceased was dead.

The admission in evidence of the pistol claimed to have been used by the defendant is assigned as error. It is contended that it was not properly identified, and for that reason it was error to admit it. We think said pistol was sufficiently identified and was properly admitted in evidence.

The asking of the following question to witness Bates is assigned as error: "Did you tend bar until the saloon was closed by the county commissioners?" It is contended that said question is wholly incompetent and was asked for the sole purpose of prejudicing the defendant. We do not think that was a legitimate examination of the witness, for it is not shown that said saloon was closed by an order of the county commissioners, and if so, when it was closed, or that that fact had any relation to this case whatever.

Assignments Nos. 23, 24 and 36 are in regard to the testimony of witness Tilley. Said witness testified on his direct examination that he was on the outside of the saloon and saw a part of the difficulty through a glass door, and the court, over the objection of the defendant, permitted the prosecuting attorney to ask said witness upon cross-examination the following two questions: "I will ask you, Mr. Tilley, this question, if you did not thirty minutes after the killing took place go to the barber-shop of Hamerick & Daly, in Grangeville, Idaho, you and Hamerick and Daly being present, and make this statement: That you had witnessed this shooting and the shooting was as cold-blooded a murder as could be, or words to that effect. I will ask you if in this same conversation, the same parties being present, did you not at that time state that you had seen the killing of McLeod, and that said killing was as cold-blooded as you ever saw or could be, and then state you came damn near being a witness in this case."

It is contended by counsel for the defendant that said questions did not go to disprove anything said by Tilley on the witness-stand or show that he had made contrary statements, and that if said witness did make said statements, they were merely

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his opinion, and that said questions were asked solely for the purpose of interjecting into the case matters that would prejudice the jury against the defendant.

It is provided, among other things, by section 6083, Revised Statutes, that a witness may be impeached by evidence that he has made at other times statements inconsistent with his present testimony.

In *Commonwealth v. Mooney*, 110 Mass. 99, the court held on the trial, on an indictment, the defendant could not introduce evidence of opinions expressed as to his innocence by a witness who had testified to circumstances tending to connect him with the crime. In 29 American and English Encyclopedia of Law, first edition, page 796, the author says: "The statement of a witness upon which he may be impeached must not only be relevant to the issue, it must also be of a matter of fact, and not merely a former opinion of the witness in relation to the matter at issue which is inconsistent with the conclusion which the facts he testified to tend to establish, unless the matter in question be one upon which the opinion of the witness is admissible in evidence." And it is laid down in Wharton's Criminal Evidence, sixth edition, section 482, that a witness after testifying to criminalizing facts against a defendant, cannot be asked whether he had not previously said that in his opinion the defendant was not guilty. The statement which it is intended to contradict must involve facts in evidence. The first part of the questions above referred to indicates that the witness had expressed his opinion that the killing was a cold-blooded murder, and the witness was not called upon to testify as to his opinion, but as to the facts what he saw or claimed to have seen; and under the well-established rule above stated, it was error to admit in evidence the opinion of this witness. That part of the question in which it was intimated the witness had said that he came near being a witness in this case would have been proper, provided the witness meant by that statement that he had not seen the affray. The witness testified that he saw a part of the difficulty between the deceased and the defendant. As there is no dispute but what the witness did see a part of

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the difficulty, we think it was error to admit in evidence said statements claimed to have been made by the witness.

Assignments Nos. 25 and 30 refer to the questions asked Doctor Bibby and Captain Hartman as to the physical strength of the defendant and comparative strength of the deceased. It appears from the record that counsel for the defendant undertook to show the physical condition of their client some two years prior to the time the homicide occurred, and the court properly refused to admit such evidence, and confined the evidence to the physical condition and comparative strength of the defendant and the deceased at the time of the homicide. Counsel for the defendant earnestly sought to introduce evidence showing the physical condition of the defendant when he went into the army and his condition when he returned from the army. This evidence was properly rejected. The correct rule in such cases is that the strength and physical condition of the deceased and the defendant at the time of the homicide may be shown. There was no error in the action of the court in this matter.

Assignments Nos. 27, 28, 29, 34 and 35 are discussed together by defendant's counsel, and involve the offer of the defendant to prove by the witness Turner that he could stand in front of the bar from whence the deceased was killed and reach over the bar and take an object off the back of the bar. This evidence was offered for the purpose of showing that the defendant being behind the bar could not retreat out of the reach of the deceased or far enough back to escape his attack. We think it was error to exclude that testimony.

It is also contended that it was error to permit said witness Turner to answer the following question on cross-examination: "A short time after the killing that evening didn't you say: 'Warney (meaning Warren Cook), Dick (meaning the defendant) is a damn good fellow and we must go and fix this thing up for him,' or words to that effect?" This was proper cross-examination for the purpose of testing the credibility of the witness and the interest he was taking in the defendant, and was properly admitted.

The state called witness Fick in rebuttal to testify as to the general reputation of the deceased for peace and quietude, and

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upon cross-examination was asked the following question: "Did you ever hear of his having a fight with Jake Lambert in Vincent's saloon?" Which question was objected to by counsel for the state and overruled by the court. Witness answered that he had not, and then the question was asked: "What did you hear about it?" Which question was objected to and the objection sustained by the court. We fail to understand how error could be committed in not permitting the witness to answer that question as long as the witness had testified that he never had heard that the deceased had had a fight with Lambert. There was no error in sustaining said objection. While great latitude should be allowed in the cross-examination of a witness who testifies as to the reputation of a person, when he is asked in regard to a particular event and swears that he never heard of it, it is not error to overrule a question as to what he had heard about it.

Assignment No. 54 is in regard to the jury taking to the juryroom the exhibits introduced in evidence, consisting of a hat, coat, vest, blood-stained undershirt and overshirt, a strap, piece of a broken Tom and Jerry mug, revolver, and the defendant's discharge from the army.

It appears from the record that after the jury had retired to consider of their verdict they called for a number of the exhibits introduced on the trial. The court called the attention of the respective counsel to that fact and suggested that all of the exhibits be sent to the jury. A formal objection was made to the exhibits being sent to the jury by counsel for the defendant. The court overruled the objection and sent the exhibits to the jury. The only section of our statute in regard to exhibits in criminal cases is section 7902 of the Revised Statutes, and is as follows: "Upon retiring for deliberation, the jury may take with them all papers (except depositions) which have been received as evidence in the cause, or copies of such public records or private documents given in evidence as ought not, in the opinion of the court, to be taken from the person having them in possession. They may also take with them the written instructions given, and notes of the testimony or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person."

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Counsel contends under the provisions of said section that papers are the only exhibits which a jury is allowed to take to their juryroom, and in support of that contention cites *Hansing v. Territory*, 4 Okla. 443, 46 Pac. 509. In that case the court, over the objection of counsel for the defendant, permitted the jury to take with them certain exhibits introduced on the trial, to wit, a Winchester rifle, revolver and the hat worn by the deceased. Section 5237 of the Oklahoma, Statutes as quoted in that opinion, as far as quoted, is like our section 7902 above referred to. The court in that case said: "It is hardly necessary to quote authority to show that the language of this article does not embrace such articles as were admitted by the court to the juryroom in this case. Those articles were certainly not 'copies' of any 'public record' or 'private documents.' Neither are they 'papers' in any sense of the term. Such a construction would do violence to language. We are further of the opinion that in the absence of statutory authority, the trial court could not legally, over the objection of defendant, permit such articles to be taken to the juryroom to be experimented with by the jury in the defendant's absence."

The supreme court of Washington, under a statute similar to ours, in the case of *Jack v. Territory*, 2 Wash. Ter. 101, 3 Pac. 832, held that the jury might take to their room the exhibits consisting of the hat and shirt. And in *State v. Webster*, 21 Wash. 63, 57 Pac. 361, the court held that exhibits properly introduced in evidence and explanatory of the evidence of witnesses might be taken to the juryroom. And in *Bell v. State*, 32 Tex. Cr. Rep. 436, 24 S. W. 418, where the clothing of the deceased which had been introduced in evidence and carried by the jury to their juryroom without objection on the part of the defendant, was not error. (See, also, 17 Am. & Eng. Ency. of Law, 2d ed., pp. 1240, 1247; 12 Ency. of Pl. & Pr., p. 589.)

In the case of *People v. Cochran*, 61 Cal. 548, a request was made by the attorney for the defendant to permit the jury upon its retiring for deliberation to take with them a diagram which had been used in the trial of the case in the examination of some of the witnesses, which request was denied by the court.

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It was held not an absolute right of the prosecution or defense to have the papers or instruments sent with the jury. The question as to the right of the jury to take other exhibits than the papers introduced in evidence and the instructions of the court was not involved in that case.

If the legislature, in passing section 7902, had intended to permit the jury to take all kinds of exhibits with them to the juryroom when considering of their verdict, it would have been an easy matter to have clearly expressed such intentions. The language of said section clearly indicates that it was the intention to permit the jury to take with them all papers, except depositions, which had been received as evidence in the case, and also copies of such public records or private documents as ought, in the opinion of the court, to be taken from the persons having them in possession. We are clearly of the opinion that any other exhibits received as evidence in the trial of the cause should not be sent to the juryroom, over the objection of the defendant; therefore the court erred in sending the exhibits above mentioned to the juryroom for their inspection by the jury.

Assignment No. 38 involves that instruction of the court containing the following language, to wit: "If the evidence shows an unlawful killing, then in order for such unlawful killing to be manslaughter and not murder there must have been shown by the evidence to have been a serious and highly provoking injury inflicted upon the person killing, . . . or an attempt by the person killed to commit a serious injury on the person killing."

It is contended by counsel for the appellant that the language there used is equivalent to saying that anyone, who, while resisting an attempt to commit a serious injury on his person, kills another is guilty of manslaughter, and contend under the law that such homicide would be justifiable and not manslaughter. Justifiable homicide is defined by section 6570, Revised Statutes, as follows: "Homicide is also justifiable when committed by any person, in either of the following cases: 1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person.

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. . . . 3. When committed in the lawful defense of such persons. When there is reasonable ground to apprehend a design to commit some great bodily injury, and imminent danger of such design being accomplished."

Said instruction contains the word "serious" while the statute uses the word "great." There is certainly a distinction between the meaning of these two words, but the vice of the instruction is in charging that one who kills another while resisting an attempt to commit a serious injury on his person is guilty of manslaughter, when, as a matter of fact, such killing would be justifiable. It was error to give that instruction.

The instruction requested by assignments Nos. 50, 51 and 54 are covered by the instructions given by the court, and there was no error in the court's refusing to give them. The assignments above referred to include all errors discussed in appellant's brief.

For the reasons herein given a new trial should be granted and the cause remanded, with instructions to grant a new trial to the defendant.

Stockslager, J., concurs.

Ailshie, J., did not sit at the hearing and took no part in the decision as he had appeared in the case as attorney for the defendant.

(June 4, 1904.)

EWIN v. INDEPENDENT SCHOOL DISTRICT NO. 8.

[77 Pac. 222.]

TEACHER'S CONTRACT—POWER OF TRUSTEES TO DISMISS TEACHER—DISCRETION OF TRUSTEES.

1. A contract between a teacher and a school district wherein E. is designated as party of the first part, and "The Board of Trustees of School District No. 8," etc., designated as the party of the second part, and the contract is signed by E. and the individual members of the school board whose names are followed by the further subscription: "The Board of Trustees of School Dis-

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trict No. 8, in and for the County of Shoshone, State of Idaho," it is held to be a sufficient compliance with section 34 of the school act (Sess. Laws 1899, p. 92) to constitute such agreement the contract of the school district and enforceable as such.

2. Under section 45 of the school law which authorizes a board of trustees to discharge a teacher "for neglect of duty, or any cause that, in their opinion, renders the services of such teacher unprofitable to the district," but requires that "no teacher shall be discharged before the end of his term without a reasonable hearing," *held*, that before such a teacher can be removed he must have notice and an opportunity to be heard.

3. Under section 84 of same act, which empowers the board of trustees of an independent school district "to employ or discharge teachers" without specifying any cause or requiring any notice to the teacher, such board has unlimited and unrestricted power to dismiss either with or without notice to the teacher, and the exercise of such discretion by the board is not subject to review or control by the courts.

(Syllabus by the court.)

APPEAL from District Court in and for the County of Shoshone. Honorable Ralph T. Morgan, Judge.

From a judgment in favor of defendant on sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

W. B. Heyburn and John P. Gray, for Appellant.

Under the statute authorizing school boards to employ or discharge teachers, it is not necessary that the members thereof should meet and act as a board in order to make a valid contract for the employment of a teacher, when they all assent to the employment. (*School Dist. No. 25 v. Stone*, 14 Colo. App. 211, 59 Pac. 885; *Crane v. Benington School Dist.*, 61 Mich. 299, 28 N. W. 105.) The presumptions are in favor of the regularity of the proceeding of a school board, and it is incumbent upon the defendant to show the defects, if any. (*Splaine v. School Dist. No. 122*, 20 Wash. 74, 54 Pac. 766.) In the absence of proof to the contrary, it will be presumed that a contract with a teacher, which is signed by all the district officers, was authorized at a meeting of the board, although they were not together when they signed it. (*Dolan v. Joint School Dist.*, 80 Wis. 155, 49 N. W. 960.) Upon this question

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of the right to discharge, the position of appellant is this: 1. That a contract made by a board of directors, having power to employ teachers for the ensuing year, even though there be a change in the directorate, is binding upon the district and upon the new board; 2. That the right of summary removal does not exist in the case of the removal of school teachers, except where specifically given by law; 3. That the power of removal in Idaho is governed by the provisions of section 45 of the act approved February 6, 1899; 4. That section 45 was by operation of law incorporated into, and read into, the contract upon which this suit was brought; 5. That the independent school district was bound by the contract and the provisions thereof, and the law which was incorporated therein, as much as the board which it succeeded. School directors have power to hire a teacher for an ensuing year, though there will be a change in the membership of the board before the term begins. (*Splaine v. School Dist. No. 122*, 20 Wash. 74, 54 Pac. 766.) A subsequent school board cannot abrogate a legal contract made by its predecessor, without valid reason therefor. (*Farrel v. School Dist. No. 2*, 98 Mich. 43, 56 N. W. 1053; *Thompson v. Gibbs*, 97 Tenn. 489, 37 S. W. 277, 34 L. R. A. 548; *School Dist. No. 3 v. Hale*, 15 Colo. 367, 25 Pac. 308, 309; *School Dist. v. McCoy*, 30 Kan. 268, 46 Am. Rep. 92, 1 Pac. 97; *Neville v. School Directors*, 36 Ill. 71; *Kennedy v. Board of Education*, 82 Cal. 483, 22 Pac. 1042; *Fairchild v. Board of Education*, 107 Cal. 92, 40 Pac. 26; *Marion v. Board of Education*, 97 Cal. 606, 32 Pac. 43, 20 L. R. A. 197.) The discretion vested in the board to remove for a cause which in their judgment is sufficient is a discretion which must be judiciously exercised and one which cannot be abused. They have a right to remove a teacher for cause, but not so long as the teacher is good, faithful and competent, and does not neglect her duty or otherwise so conduct herself as to render her services inimicable to the welfare of the district. (*Spaulding v. Coeur d'Alene Ry. etc.*, 5 Idaho, 528, 51 Pac. 408.)

C. W. Beale, for Respondent.

This court has laid down the rule for the government of officers and agents of our public and municipal corporations in

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the case of *Clyne v. Bingham County*, 7 Idaho, 75, 60 Pac. 76, in which it is stated that a matter of this kind is not a matter between the trustees (Sutherland, Wourms and McKissick) and appellant, but it is a matter in which the public, the taxpayers—those who “bear the burden in the heat of the day”—have some rights in the premises which cannot be frittered away by public officers. In that case, the county attorney tried to stipulate away the rights of the taxpayers of Bingham county. In this case, Sutherland, Wourms and McKissick tried to make a contract to which they signed their individual names, and a different contract from that authorized by law. In the *Clyne* case, the court says: “The county attorney cannot stipulate away the rights of the people, and any attempt to do so is unauthorized, unwarranted and deserving of severe rebuke.” So we say, applying the same rule to the case at bar, Sutherland, Wourms and McKissick could not stipulate away the rights of the taxpayers of School District No. 8, nor make and execute any contract in any manner, form or substance whatever different from such a contract as is prescribed by law. The mode and manner prescribed by the statute for the execution of contracts on the part of the ordinary school district must be followed strictly, and any other manner is excluded by the law. (*Zottman v. San Francisco*, 20 Cal. 97, 81 Am. Dec. 96.) In order to bind School District No. 8, the trustees must have acted as a board and their actions must have been made a matter of record, and the complaint must show that the contract was made by the trustees for and on behalf of the district, in its name, and only while sitting as a board of trustees. (*Conger v. Board of Commrs.*, 5 Idaho, 347, 48 Pac. 1064; *Dunbar v. Board of Commrs.*, 5 Idaho, 407, 49 Pac. 409; *Castle v. Banrock County*, 8 Idaho, 124, 67 Pac. 35; *Thomas Kane & Co. v. School Dist. No. 112 of Osborn Co.*, 5 Kan. App. 260, 47 Pac. 561; *McCortle v. Bates et al.*, 29 Ohio, 419, 23 Am. Rep. 758.) The concurrence of a majority of the board of directors when duly assembled is essential to the performance of a valid act. The assent of several members separately is not enough and any action based thereon will not be binding upon the district. (*Herrington v. District Township of Liston*, 47 Iowa, 11.)

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Appellant was bound to know the law. In fact, the contract upon which she was suing, in direct terms, made the law a part of her contract. This, however, was not necessary, as the law that authorized her summary dismissal by the trustees of respondent, provided School District No. 8 should become an independent district (as it did subsequent to the date of her alleged contract), became a part of her contract, and the same was subject to any laws in existence at the time of the execution thereof. The statute that gives the board power to remove all teachers becomes a part of every contract which a teacher makes for his employment. (*Gillan v. Board of Regents of Normal Schools*, 88 Wis. 7, 58 N. W. 1042, 24 L. R. A. 336; *Head v. Curators of the University of Missouri*, 86 U. S. (19 Wall.) 530, 22 L. ed. 160; *Eckloff v. District of Columbia*, 135 U. S. 240, 10 Sup. Ct. Rep. 752, 34 L. ed. 120.) The courts of Idaho have no jurisdiction to inquire into the question of the proper or improper exercise of authority and discretion exercised by the board of trustees of an independent school district under section 84, Session Laws of 1899, page 105, and, in support of our position, cite the following authorities: *Directors v. Burton*, 26 Ohio St. 421; *In re Hennen*, 13 Pet. 230, 10 L. ed. 138; *Langdon v. Mayor*, 92 N. Y. 427; *Gillan v. Board of Regents of Normal Schools*, 88 Wis. 7, 58 N. W. 1042, 24 L. R. A. 336; *Knowles v. Boston*, 12 Gray (Mass.), 339; *Wood v. Medfield*, 123 Mass. 545. If some school board is liable to appellant, she should have sued it and not this respondent. The well-known doctrine that a pleading should be strictly construed against the pleader is especially applicable to the case at bar. (*Collins v. Townsend*, 58 Cal. 608; *Hays v. Steiger*, 76 Cal. 555, 18 Pac. 670; 4 Ency. of Pl. & Pr., p. 759.) The declaration in the amended complaint that appellant was discharged without cause and in violation of her contract is merely a conclusion, which the demurrer in this case does not admit as being true. (*Ollis v. Orr*, 6 Idaho, 474, 56 Pac. 162; *Langdon v. Mayor*, 92 N. Y. 427.)

AILSHIE, J.—This case was commenced in the district court of Shoshone county by the plaintiff, Elizabeth Ewin, for the recovery of \$300 damages for her wrongful dismissal as a

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teacher in the public schools of the town of Wallace. By her complaint she alleges that on the eighth day of April, 1901, the town of Wallace constituted School District No. 8 of Shoshone county and that Angus Sutherland, J. H. Wourms and D. C. McKissick were at that time the members of its board of trustees. She alleges that on that date, and while she was the holder of a valid teacher's certificate authorizing and entitling her to teach in any of the schools of Shoshone county, she entered into a contract in writing with the board of trustees of said district whereby they employed her to teach in the public schools of that district at the monthly salary of \$75 for a period of nine months from and after the second day of September, 1901. That on the seventeenth day of May, 1901, and in pursuance to the provisions of chapter 10 of an act of the legislature approved February 6, 1899, entitled "An act to establish and maintain a system of free schools," the town of Wallace and the territory formerly comprising school district No. 8 of Shoshone county was established and created into what was thereafter, and is now, known as the "Wallace Independent School District No. 8"; and that thereupon the said independent school district by virtue of law succeeded to all the rights and privileges and assumed all the duties and obligations of the old district. That pursuant to the contract between the plaintiff and the board of trustees of the old district, she entered upon the performance of her duties as a teacher and continued to discharge such duties until the twenty-fifth day of February, 1902, upon which date the board of trustees of the independent district, "without cause and in violation of their said contract, assumed to discharge the plaintiff as such teacher in disregard of the terms and conditions of the said contract," and that they thereafter excluded her from the school building and prevented her from discharging the duties of a teacher for the remainder of the term to her damage in the sum of \$300, balance due her under and by virtue of her contract for the full period of nine months.

The foregoing are, in substance, the allegations of the plaintiff's amended complaint. The contract upon which the action is brought is pleaded *in haec verba*. To this complaint the de-

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defendant district demurred upon the grounds that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was sustained and judgment was entered for the defendant and this appeal is taken therefrom.

The only question presented for our consideration upon this appeal is as to the sufficiency of the complaint. The defendant seems to have urged two reasons in the lower court why its demurrer should be sustained and has presented the same questions in this court. The first reason presented is that the contract pleaded was never a legal or binding contract between the plaintiff and School District No. 8. This contention is predicated upon the terms of the contract and manner of its execution. The contract on its face purports to have been entered into "between Elizabeth Ewin, party of the first part, and the board of trustees of School District No. 8 of the county of Shoshone, in the state of Idaho, party of the second part," and is signed as follows: "In testimony whereof we have hereunto set our hands the day and year first above written.

"ANGUS SUTHERLAND,

"JOHN WOURMS,

"D. C. McKISSICK,

"The Board of Trustees of School District No. 8, in and for the County of Shoshone, State of Idaho.

"ELIZABETH EWIN, Teacher."

Section 34 of the school law (Sess. Laws 1899, p. 92), provides that "each regularly organized school district in the state is hereby declared to be a body corporate by the name and style of School District No —, in the county of —, in the state of Idaho, and in that name the trustees may sue and be sued, hold and convey property for the use and benefit of such district and make contracts the same as municipal corporations in this state." Under this provision of the statute it is contended by respondent that the contract should have been executed by "School District No. 8 in the county of Shoshone, state of Idaho," by and through its proper officers and not by the board of trustees in their individual capacity. As a matter of law we think this contention is correct, but the contract here pleaded discloses upon its face that it was executed for the

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school district and as its contract and agreement and for its use and benefit. It is such a contract as the district could enforce in its corporate capacity, and, on the other hand, one which the individuals composing the board could not have enforced in any other capacity than as trustees of and for the school district. It is true that this is not executed in the manner and form in which the contracts of corporations are usually executed, but it is not so deficient that we would hold it void as between the plaintiff and the school district represented by the trustees who executed it.

The other contention made by the school district is founded upon the provisions of section 84 of the act of February 6, 1899, entitled "An act to establish and maintain a system of free schools." This act contains eighty-eight sections and is divided into ten chapters. Chapter 6 deals with the election and powers and duties of trustees, the employment of teachers and raising of revenue for the ordinary school district; while chapter 10 provides, *inter alia*, for the organization of independent school districts, the election, qualifications, powers and duties of a board of trustees, the raising of revenue and employment and discharge of teachers. That portion of section 84 upon which the defendant relied for the sustaining of its demurrer is as follows: "The board of trustees of said district must have power to, and it is their duty. . . . 2. To employ or discharge teachers, mechanics and laborers, and to fix, allow and order their salaries and compensation, and to determine the rates of tuition for nonresident pupils." It is claimed that this statute gives to the board of trustees of an independent school district absolute power and authority to discharge a teacher without notice and without assigning any reason or cause whatever therefor. It is argued by the appellant that since this contract was entered into by the board of trustees of the old district, it must be tested by the provisions of the law governing such boards, and that it could not be terminated in any other manner than that provided for the termination of such contracts by a board of trustees of the ordinary school district. In support of this contention the appellant relies upon that portion of section 45 which provides that "It shall be the duty of the trus-

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tees of each district to employ teachers, on a written contract, and to discharge the same, and to fix, allow and order paid their salaries and compensation and the compensation of the clerk of the board, and to determine the rate of tuition of nonresident pupils, and they shall have power to discharge any teacher for neglect of duty, or any cause that, in their opinion, renders the service of such teacher unprofitable to the district, but no teacher shall be discharged before the end of the term, without a reasonable hearing."

It will be seen from the foregoing that a board of trustees of an ordinary school district cannot discharge a teacher before the end of his term without giving him a reasonable hearing, and that such discharge when made must be founded upon a neglect of duty or some cause that in the opinion of the board renders the services of the teacher unprofitable to the district. It will also be seen that when the legislature came to providing the powers and duties of a board of trustees for an independent district, they authorized them to "discharge teachers," and that such power and authority is not coupled with any limitation as to cause for such discharge or notice of hearing thereon. Appellant urges that since section 85 provides that "all the provisions of this act providing for a public school system, wherein not contradictory to or inconsistent with the provisions of this chapter and which may be made applicable to the objects thereof, are adopted as a part of the law governing the establishment and management of independent school districts," the legislature must be understood as having intended to read section 84 in connection with section 45, and thereby require all removals to be made for cause and upon reasonable notice. It seems to us, however, that such an interpretation and construction of these statutes is unauthorized. In fact such a construction would do violence to the intent and purpose of the statute and the objects of the legislature. It was clearly the intention of the legislature to provide that no teacher of an ordinary school district should be discharged prior to the end of his term except for cause, and in no event without a hearing. An examination, however, of the subsequent portions of that act, and especially chapter 10, convinces us that

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the legislature meant to, and did, give to independent school districts much more ample and plenary powers upon every subject connected with the schools within such districts than they had granted or intended to grant to the ordinary school district. Indeed, the object of converting a district into an independent district is to enlarge the powers and extend the privileges of the new district thus formed in order to more thoroughly organize, establish and maintain its public schools and secure a higher degree of efficiency and discipline in the school work. It is significant to our minds that the legislature, after having made these requirements as to the discharge of a teacher from a school of the ordinary district, immediately passed to the subject of independent school districts and authorized the discharge of a teacher without attaching any requirements as to cause for discharge or notice of intention to do so. Under the ordinary and generally accepted rules of construction, the legislature, in the same act, having in one section provided that a set of trustees for one class of districts should not discharge a teacher except for cause, after reasonable notice, and in a subsequent section providing that the board of trustees for another class of districts might discharge a teacher, without limiting that discharge to any cause or requiring any notice, they must be deemed to have purposely omitted the cause and notice from the latter section. It was evidently the intention to authorize a board of trustees of an independent school district to discharge a teacher at will or pleasure. The contract must be read in view, equally, of the provisions of both sections 45 and 84, and the appellant must be deemed to have agreed to subject herself to the contingencies of section 84 in the event the district should, in the meanwhile, become organized into an independent school district.

We do not think the authorities cited by appellant upon this branch of the case support her contention under a statute like ours. In *Farrell v. School Dist. No. 2*, 98 Mich. 43, 56 N. W. 1053, a contract was entered into between the board of trustees and a teacher, and before the opening of the school year an election was held, and a majority of the old board went out of office and the new board immediately met and organized and

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passed a resolution rescinding the contract executed by the old board in hiring the teacher, and notified him of their action. Of this procedure the supreme court of Michigan said: "For this action no reason was given. It was not in the power of the subsequent board to rescind a contract which was lawfully made by the old board without some valid reason therefor. These school contracts are governed by the same rules as other contracts, and when once lawfully made are equally binding upon both parties. Neither can violate them without compensating the other for the damages sustained." Here, it will be observed, the decision of the court was not founded upon any statutory provision as to the right of dismissal of the teacher; and the opinion rests squarely upon the general law of contracts. *Thompson v. Gibbs*, 97 Tenn. 489, 37 S. W. 277, 34 L. R. A. 549, denies the rights of a board of trustees to discharge a teacher except for cause and after notice to him, and a stipulation in the contract authorizing them to do so was held invalid. An examination of that decision and the statutes of the state of Tennessee upon which it is based discloses the fact that under section 1192 of the statutes of 1884 of that state, it is provided that the school directors are authorized and empowered "to employ teachers and to dismiss them for incompetence, improper conduct, or inattention to duties." In *Morley v. Power*, 5 Lea, 700, the supreme court of Tennessee considered the foregoing provision of their statute and the right of a board of trustees to dismiss a teacher, saying: "The right to remove for the causes mentioned in the act is clear, but the very fact that the causes of removal are specified demonstrates that the discretion is not unlimited. Whenever there is a limitation in the power, the determination whether the case is within the power rests with the courts, not with the officers authorized to remove, for, otherwise, the limitation would be of no avail, the discretion being practically unlimited. Their judgment as to what the law allows them to determine, or as to the extent of their jurisdiction, will be controlled." *School District v. Hale*, 15 Colo. 367, 25 Pac. 308, seems to have been decided upon the general principle applicable to the termination of ordinary contracts. The Colorado court there says: "It was always true

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that where a contract of hiring was entered into between two parties for a fixed period, at a definite price, the employer could not escape liability for a discharge without cause. If the contract was broken by the employer, a cause of action at once arose in favor of the one discharged, who might, upon the expiration of the period of hiring, recover damages resulting from the breach." It is worthy of observation, however, that section 305 of the Code of Colorado, referred to in that opinion, provides that "No teacher shall be dismissed without due notice and upon good cause shown and such teacher shall be entitled to receive pay for services rendered." Here, it will be seen, the statute was positive in its terms both as to the cause and as to the giving of notice. *Kennedy v. Board of Education*, 82 Cal. 483, 22 Pac. 1042, seems to turn upon the provisions of section 1793 of the Political Code of California, which provides that when certain teachers have been elected they "shall be dismissed only for violation of the rules of the board of education, or for incompetency, unprofessional or immoral conduct." A decision resting upon a statute like that of California cannot be much authority under a statute like ours. *Fairchild v. Board of Education of the City and County of San Francisco*, 107 Cal. 92, 40 Pac. 26, simply follows the Kennedy case and rests upon section 1793 of the code. In Wisconsin, section 404 of the Revised Statutes provides that a school board may "remove at their pleasure any principal, assistant or other officer or person from any office or employment in connection with any such school," and the supreme court of that state, in *Gillan v. Board of Regents of Normal Schools*, 88 Wis. 7, 58 N. W. 1043, 24 L. R. A. 336, said: "This power of summary removal of a teacher vested in the board by statute is a discretionary power, and its exercise in a given action cannot be inquired into, or questioned, by the courts." And again, they say: "The statute became a condition of his contract, as much as if it was written in it, that the board might remove him at pleasure. He accepted the employment with knowledge of the law on this condition of his contract, and he has no reason to complain of it. These principles appear to be unquestionable. . . . If the exercise of this discretionary power

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conferred on the board by the statute is not effectual to remove a teacher in the normal schools and terminate his wages, then the statute is nugatory and has no force whatever, and it had better be repealed." In *Regina v. Governors of Darlington School*, 51 Eng. Com. L. 68, the school was founded by royal charter authorizing the governors thereof to select a master of such school "so often as to them and their successors, or the major part of them, occasion them moving thereto, should appear, and of removing the same master or usher from the said school, according to their sound discretion." In passing upon the right of the governors to dismiss the master without notice, the court of queen's bench, through Lord Denman, said: "The power of the governors so to remove justifies their so doing; and it is not to be restricted by any opinion which we may form of the reasons on which they have been induced to exert it." This case was taken by error into the exchequer chamber in 1844 and the judgment of the queen's bench was affirmed, Chief Justice Tindal saying: "And there seems nothing unreasonable in the founder's giving such authority to the governors. For there may be many causes which render a man altogether unfit to continue to be a schoolmaster, which cannot be made the subject of charge before a jury, or otherwise of actual proof. A general want of reputation in the neighborhood, the very suspicion that he has been guilty of the offenses stated against him in the return, the common belief of the truth of such charges amongst the neighbours, might ruin the well-being of the school if the master was continued in it, although the charge itself might be untrue, and at all events the proof of the facts themselves insufficient before a jury. Many other grounds of amoval fully sufficient in the exercise of a sound discretion might be suggested." So far as we are able to find, the rule established in this case has never been departed from in the English courts, and the principle, it seems to us, is as sound now and in this country as it was then.

In *Eckloff v. District of Columbia*, 135 U. S. 240, 10 Sup. Ct. Rep. 752, 34 L. ed. 120, the supreme court of the United States discusses the right of removal where the general power to do so is granted without limitation. The conclusion reached

Points decided.

by that court is stated by them as follows: "The grant of a general power to remove carries with it the right to remove at any time or in any manner deemed best, with or without notice."

After an examination of the various authorities cited by respective counsel, as well as others, we conclude that the general principle running through them all is: That where the power to remove is restricted or limited to certain reasons or causes, the final determination as to whether the case falls within any of those causes rests with the courts and may be reviewed or inquired into by them. And that, on the other hand, where the power is general, unlimited, and unrestricted and is once exercised, it cannot, and will not, be questioned or examined into by the courts. It may be exercised either with or without notice.

The complaint in this action showing upon its face, as it does, that the plaintiff was removed by the board of trustees of the independent district, failed to show facts sufficient to constitute a cause of action, and the demurrer was properly sustained. The judgment of the trial court is affirmed, with costs to respondent.

Sullivan, C. J., and Stockslager, J., concur.

(June 4, 1904.)

ROBERTSON v. MOORE.

[77 Pac. 218.]

COMPLAINT—WHAT SHOULD CONTAIN IN FORECLOSURE OF LABORERS' LIENS—CONFLICTING EVIDENCE IN EQUITY CASES—JUDGMENT SHOULD DESCRIBE LAND TO BE SOLD—WHAT THE NOTICE OF LIEN SHOULD CONTAIN—APPLICATION FOR CONTINUANCE—FEES IN MECHANIC'S LIEN CASES.

1. A complaint for the foreclosure of a laborer's lien that sufficiently describes the property, fixes the time and manner of labor, the amount due, and that the lien was filed within the statutory time together with necessary requirements in ordinary suits in equity is sufficient.

Argument for Appellants.

2. Where there is a substantial conflict in the evidence on material issues involved, this court will not reverse the trial court either in law or equity cases, where the case has been tried on oral evidence.

3. By the provisions of the Session Laws of 1899, being termed an act to secure liens for mechanics, laborers, materialmen and other persons, found on page 147, section 4 requires the trial court to ascertain the amount of land necessary for the convenient use of the property to be sold, and it is error not to do so.

4. The notice of lien should contain a statement of the demand; the name of the owner or reputed owner if known; the name of the person by whom employed; a description of the property, which claim must be verified.

5. An application for the continuance of a cause appeals to the sound discretion of the trial court, and his ruling thereon will not be disturbed by this court unless it appears that there has been an abuse thereof.

6. Attorneys' fees are allowed in the foreclosure of mechanics' and laborers' liens.

7. In an action to enforce a mechanic's or laborer's lien, where it is shown by counterclaim or cross-complaint that there is a demand for affirmative relief, either party is entitled to a jury trial on that issue, if it is in the nature of an action at law.

(Syllabus by the court.)

APPEAL from the District Court of Idaho County. Honorable Edgar C. Steele, Judge.

Action to foreclose laborer's lien. Judgment for the plaintiff from which defendants appeal. Cause remanded with instructions to modify judgment after proof.

Fogg & Nugent and W. H. Cassady, for Appellants.

Where the claimant alleges an implied contract in his notice of lien and in his complaint, and the evidence shows an express contract, it is a material variance and the plaintiff is not entitled to recover. (*Wilson v. Hind*, 113 Cal. 357, 45 Pac. 695; *Fischer v. Hanna*, 8 Colo. App. 471, 47 Pac. 303.) Where defendants demand a trial by jury, the court has no jurisdiction to render a personal judgment against them in case the plaintiff fails to establish his claim of lien. (*Hilderbrant v. Savage*, 4 Wash. 524, 30 Pac. 643.) Plaintiff's second cause of action should have been dismissed. (*Warren v.*

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Quade, 3 Wash. 750, 29 Pac. 827.) The statutes determine what property is to be sold and how the sale is to be ordered. "The land upon which any building . . . is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof to be determined by the court in rendering judgment, is also subject to the lien." (Sess. Laws 1899, p. 148.) This decree is clearly erroneous, in that it attempts to vest judicial power in the sheriff to determine what shall be sold. It would seem that under the law and the evidence in this case the most favorable judgment that plaintiff could be entitled to, in the absence of all proof of what land was necessary, would have been a judgment decreeing a lien on the Crystal Butte claim—the claim on which the improvements were located.

L. Vineyard, for Respondent.

The complaint stands intact upon the second and third alleged causes of action, showing an alleged balance due the plaintiff from defendants of \$1,315.75 over and above all just credits and offsets. The complaint needed no amendment. (Boone on Code Pleading, sec. 250.) The second objection raised to the complaint was raised by motion to strike out, after the demurrer had been disposed of as above. This same principle is sustained in *Alvord v. Hendrie*, 2 Mont. 115; *Selden v. Meeks*, 17 Cal. 128; Sess. Laws 1899, p. 155; Phillips on Mechanics' Liens, pp. 571, 572, secs. 345, 426, 429; Boone on Code Pleading, p. 513, secs. 276, 277; Idaho Rev. Stats., secs. 4229, 4231. Labor incidental or necessary to the performance of the work done will be protected by the lien. (Phillips on Mechanics' Liens, secs. 501, 502.)

STOCKSLAGER, J.—This cause was tried in the district court of Idaho county; judgment was in favor of the plaintiff, from which and an order overruling a motion for a new trial the appeal was taken. A demurrer was sustained to the first and fourth causes of action and overruled as to the second and third set out in the complaint; thereafter a motion was submitted to the court to strike out of the complaint all of the

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second and third causes of action, designated as paragraphs 5, 6, 8, and 9; also all of paragraph 7 except the following words: "Plaintiff avers that the sum of \$625.25 and no more have been paid on said contracts above mentioned which is described in said lien, also all of exhibit 'A' designated in said complaint as 'laborer's lien'; also all allegations in relation to said claim of lien that appear in his said second and third causes of action in said complaint, on the ground that the same is irrelevant and redundant matter, for the reason that it appears on the face of said causes of said action and said claim and notice of lien that no lien or right to a lien exists upon said causes of action, and that said notice of lien does not comply with the statutory requirements essential to a valid lien in such matters and that the same is void."

This motion was overruled. The second and third causes of action set out in the complaint are as follows: "Plaintiff for a second cause of action against the said defendants alleges: That on the thirteenth day of May, 1902, he entered into a second agreement with the said defendant, Wilbur E. Moore, as the agent of the said defendants, and on their behalf, by which agreement plaintiff agreed to transport and place said mill machinery upon the site where the same was to be erected and constructed, to wit, upon the said Crystal Butte mine, for which said work and labor the plaintiff was to be paid, under said agreement, what the same should be reasonably worth per day, in the event the plaintiff should succeed in so moving said mill machinery; plaintiff avers that he has fully kept and performed the said agreement in all things to be by him kept and performed, but the said defendants, nor either of them, has paid anything on said agreement except as hereinafter mentioned; that under said last agreement the said plaintiff worked in moving said machinery to said Crystal Butte mine for the period of seventy-four and three-fourths days; that the same was and is reasonably worth the sum of \$10 per day, which is due and owing plaintiff from said defendants under said agreement. To avoid repetition plaintiff hereby incorporates paragraphs 5, 6, 7, 8, 9 of this complaint as parts of this second cause of action and for that purpose refers to the same."

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The third cause of action alleges: "That on the first day of August, 1902, the plaintiff entered into an agreement with the said Wilbur E. Moore, agent for and acting on behalf of said defendants, to erect and construct said mill machinery as specified in second cause of action into a quartz-mill of ten stamps complete in all its parts on said Crystal Butte mine, together with tramway running from said mill to the lower tunnel of the Wise Boy mining claim, a distance of about one thousand feet, the said defendants to furnish the plaintiff all materials necessary and requisite to do and perform said agreement on his part, and to board said plaintiff while performing said agreement at the rate of \$1 per day, and to pay the plaintiff for building said mill and tramway what the same should be reasonably worth per day, until the same was completed, and plaintiff avers that he completed said quartz-mill building and tramway under said contract on the eleventh day of November, 1902, and that he has fully kept and performed the said agreement in all things to be by him kept and performed, but the said defendants, nor either of them, have not paid the said sum of \$10 per day for the period of one hundred and three days, the period of time consumed in performing said contract, nor have the defendants, or either of them, paid any part thereof except as hereinafter mentioned, but the same is due and owing from the defendants to plaintiff. To avoid repetition plaintiff hereby incorporates paragraphs 5, 6, 7, 8, 9 of this complaint as a part of this third cause of action and for that purpose refers to same."

The fifth allegation is "That the lands upon which said quartz-mill and tramway was so erected and upon which plaintiff worked and labored as aforesaid are described as follows, to wit: The Crystal Butte lode mining claim, and the Wise Boy lode mining claim, situate in Robbins mining district, Idaho county, Idaho, the same being prominent and well-known mining claims in said district, and being duly recorded in the records of quartz claims in said county and state. And plaintiff avers that the whole of said mining claims are required for the convenient use and occupation of said quartz-mill building."

The sixth allegation is "That at the dates of the said above

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several contracts the defendants were the owners and the reputed owners of the said two lode mining claims, and ever since have been, and now are, the owners of said mining claims, and the said quartz-mill building and tramway erected and constructed thereon."

The seventh relates to the filing of lien which is termed exhibit "A" of the complaint.

The eighth shows the amount paid for verifying and recording lien.

The ninth alleges that \$250 is a reasonable attorney's fee, etc.

The answer denies all the allegations of the complaint including the sufficiency of the lien set out in exhibit "A" of plaintiff's complaint. Avers that plaintiff represented himself as a skilled and competent millwright as an inducement to his employment to perform the services mentioned in his third cause of action; also that he was a skilled and competent mill builder and operator and a competent sawyer; that plaintiff undertook and agreed to perform all the services in a skillful and workmanlike manner, and that said representations and agreement on plaintiff's part were the inducement and consideration of said contract of employment upon which said plaintiff's cause of action is based. That by reason of the unskillful, careless and unworkmanlike manner of construction a certain retaining wall, being an essential part of the foundation of said quartz-mill, fell during the progress of said construction, and that by reason of extra expense and delay the defendants were damaged in the sum of \$350; that plaintiff in his unskillful, careless and unworkmanlike manner in operating the saw-mill caused the destruction of a certain saw of the value of \$100, and they were thus damaged in the sum of \$100, making a total damage of \$450, which they ask may be offset against any sum that may be found for the plaintiff; that defendants did not at any time agree to pay plaintiff for his services what the same should be reasonably worth per day, or any sum greater than \$5 per day.

Upon the issues thus framed this cause was tried without a jury and on the twentieth day of May, 1903, the court filed its

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findings of fact and conclusions of law. The court finds: "1. That for the period of seventy-four and three-fourths days, commencing on the thirteenth day of May, 1902, the plaintiff, P. C. Robertson, performed work and labor for said defendants, at the instance and request of Wilbur E. Moore, the authorized and acting agent of said defendants, in transporting and moving certain quartz-mill machinery to the Crystal Butte mining claim, to the place on said claim where the same was to be erected, in the Robbins mining district, Idaho county, Idaho; the said mining claim being owned and possessed by the defendants, except defendant Wilbur E. Moore."

The second finding is "That said work and labor was and is reasonably worth the sum of \$7.50 per day; the same being in all things fully performed by the plaintiff according to the terms of the agreement set forth in the complaint herein—for which the plaintiff has been paid; that nothing is due and owing thereon from defendants to plaintiff; that the sum of \$625.25 has been paid by defendant to plaintiff which overpays the above amount in the sum of \$64.37."

The third finding is "That for the period of one hundred and three days, commencing on the first day of August, 1902, the said plaintiff, under a contract made with Wilbur E. Moore, as the agent of said defendants, the plaintiff erected said quartz-mill machinery into a ten-stamp quartz-mill, complete in all its parts, on the said Crystal Butte mining claim, mentioned in finding No. 1 of these findings; and did, during said period of one hundred and three days, under said contract, construct and build a tramway, about one-thousand feet in length, from said mill, and connected therewith, and running therefrom to what is known as the lower tunnel of the Wise Boy mining claim; that said tramway is used in conveying ore or quartz rock from said Wise Boy mining claim to said mill. That under said contract so made for building said quartz-mill and tramway, the defendants agreed to pay the plaintiff, by and through their said agent, Wilbur E. Moore, what the same should be reasonably worth per day; that the same is reasonably worth the sum of \$7.50 per day for the said period of one hundred and three days, as set forth in the complaint herein."

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The fourth finds "That \$64.37, and no more, has been paid by defendants on account of building in said quartz-mill and tramway described in finding No. 2 above."

The fifth finds "That the amount of \$703.13 and interest thereon at seven per cent per annum from the first day of January, 1903, is now due and unpaid according to the terms of said contract, as set forth in said finding No. 3, and complaint herein."

The sixth is "That the lands and premises upon which the said quartz-mill and tramway were constructed and erected, to-wit, the Crystal Butte lode mining claim, and said Wise Boy lode mining claim, set forth in the complaint herein, and situated in Robbins mining district, Idaho county, Idaho, were and are owned and possessed by the said defendants, they being the owners and reputed owners thereof, except defendant Wilbur E. Moore, who has no interest as owner in said Crystal Butte mining claim."

The seventh is "That all that part of the Crystal Butte mining claim upon which said quartz-mill and appurtenances and tramway are built, together with so much of the grounds as the Wise Boy mining claim, in and upon which said lower tunnel is run and connected with the said mill by said tramway, are requisite for the convenient use and occupation of said quartz-mill, building and tramway."

The eighth is "That on the twentieth day of December, 1902, the plaintiff, to perfect a lien for the moneys so due him from defendants, set forth in the complaint, filed for record in the recorder's office of Idaho county, Idaho, his notice of lien, and the same was duly recorded in said office."

The ninth, "That plaintiff paid out as costs for filing and recording said lien the sum of \$2.80 and that \$110 is a reasonable attorney's fee."

The tenth is that all the above sums, together with interest and accruing costs, are each and all a valid lien upon the said quartz-mill building and tramway, together with so much of the land and premises of the said Crystal Butte and Wise Boy mining claims as is requisite and necessary to the convenient use and occupation of said mill building and tramway, and upon

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which the same is secured by the notice of lien mentioned in the complaint in this action.

The eleventh finds "That each and all of the allegations and averments in the complaint herein, except as modified and qualified by these findings, are true."

The twelfth finds "That the said defendants are not entitled to recover of the plaintiff any of their said alleged damages mentioned in their answer in this action."

The thirteenth is "That each and all of the terms and conditions of said lien have been broken by the said defendants."

As conclusions of law the court finds that plaintiff is entitled to judgment for the sum set out in the findings and that plaintiff is entitled to have his lien enforced.

The judgment follows the findings of fact and conclusions of law.

The first assignment of error is that the court erred in overruling defendant's demand for a jury trial. We obtain the following facts from the record: "Be it remembered that on this seventh day of March, 1903, in open court, the plaintiff demanded that this cause be heard by the jury and the court overruled the demand and held the cause to be one in equity and triable by the court; and at this time the jury was permanently discharged for the term. And now on the seventeenth day of March, 1903, the cause was called for trial before the court without a jury and the defendant demanded that the cause be tried by a jury, claiming the lien under the facts to be an invalid lien and that the matters to be tried were therefore issues of law. And be it further remembered that before entering upon the trial of said cause the following objection was made:

"Come now the said defendants severally and object to the trial of this cause before the court without a jury, for the reason that the complaint does not state facts showing any cause of action in equity, or entitling the plaintiff to any equitable relief, particularly in that there are no facts shown creating any lien upon the property, and that the complaint at best simply states an account for work and labor against defendants, or a portion of the defendants."

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It is here shown that defendants did not join plaintiff in his demand for a trial by jury, but ten days afterward, and ten days after the jury had been discharged for the term, when the case was called for trial, a jury trial is demanded, not on their demand for damages in the sum of \$350 for the unskillful manner in which plaintiff has constructed the retaining wall, or the sum of \$100 alleged to be the result of plaintiff's unskillful manner of operating the saw, but for the reason there were no facts shown creating any lien upon the property. If the demand had been made for the submission of the question of damages set up in the counterclaim, then the court should have submitted that issue to the jury for a determination thereof, and it would have been error to refuse to do so. Under the circumstances we find no error in the ruling of the court. (*Christensen v. Hollingsworth*, 6 Idaho, 87, 53 Pac. 211.)

It is urged that attorneys' fees cannot be allowed in cases of this character. This court recently passed upon this question. (*Thompson v. Wise Boy M. & M. Co.*, 9 Idaho, 363, 74 Pac. 958.)

The second assignment is based on the refusal of the court to grant the defendants a continuance until the evidence of W. E. Kelly could be secured. The affidavit of Wilbur E. Moore states: "W. E. Kelly is, and for a long time past and ever since the first day of February, 1903, has been, at the mill situated on the Crystal Butte quartz claim near Hump, Idaho; that his duties there are such as to require his constant attention, and he could not absent himself from his said business at said place without great loss to said business; that said W. E. Kelly had arranged to be in attendance as a witness at the trial of this cause, and to come out immediately upon notification that the case was set for trial; that this cause was set for trial on Saturday, the fourteenth day of March, 1903; that immediately after the court set the cause for trial on said day, W. H. Cassidy, one of the attorneys for the defendants, wrote said Kelly, notifying him that the case was so set, and also notifying him to come out immediately as a witness; that in addition to said notice this affiant wrote the said Kelly to the same effect; that owing to the extraordinary storms and the impassable condition of the

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roads, the said W. E. Kelly did not receive the said communication in time so that he could reach the village of Grangeville, the place of holding this court, on the said fourteenth day of March, or at any time earlier than the seventeenth day of March, 1903, and that said Kelly, believing that the said trial had already been had, or would be had before he could possibly arrive in Grangeville, did not come out in response to said letter; affiant positively avers that the reason of the nonattendance of the said witness Kelly at the trial of this cause has been because of the said extraordinary condition of the roads, thereby delaying and impeding communication between Grangeville and the said residence and place of business of the said Kelly, and could not have been foreseen or prevented by either this affiant or any of the defendants hereto."

Applications of this character are largely within the discretion of the trial court, and unless it is shown that there has been an abuse of discretion, the order will not be disturbed by this court. Now, what are the facts? The witness Kelly is a party to the suit; it is shown by the affidavit of Wilbur E. Moore that he was at the time ready to come out when notified. The affidavit did not inform the trial court of the nature or importance of his occupation or employment there. He says: "His, Kelly's, duties, there are such as require his constant attention, and he could not absent himself from said business without great loss to said business." This is merely the conclusion of the witness, no facts stated that would inform the court of the necessity of Kelly's presence at the mill. Applications for a continuance based on the absence of a party to the suit do not appeal with the same force as an application for an absent witness who is a stranger to the litigation. All parties to the suit are supposed to be in attendance ready for trial and especially if they are necessary witnesses. On the other hand, a stranger to the litigation may try to avoid the service of process or purposely absent himself from the jurisdiction of the court, and even under such conditions diligence must be shown to procure the attendance of the absent witness, and that such diligence has failed to procure the attendance of the witness through no fault of the party making the application. We find no error in this ruling of the court.

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The third assignment of error is based upon the ruling of the court in overruling defendants' demurrer to plaintiff's second and third causes of action. This assignment is not discussed in appellant's brief. We find no error in this ruling of the court.

The fourth assignment relates to the ruling of the court in refusing to sustain defendants' motion to strike out certain portions of plaintiff's second and third causes of action. This assignment is not discussed in the brief. We find no error in this ruling of the court.

Learned counsel who represent the defendants in this case in their brief say: "The main contention between the parties hereto is in relation to the contract of employment under which the services of the plaintiff were performed. It is the contention of the plaintiff that the services set out in his second and third causes of action were performed under implied contracts of employment, and that such services are reasonably worth the sum of \$10 per day. The position of the defendants is that such services were performed under an express contract and that the plaintiff was to be paid therefor at the agreed rate of \$5 per day." Counsel for respondent accepts this theory and devotes nearly his entire brief in the discussion of the evidence bearing on this question, and ably and earnestly insists that the findings and conclusions of the court are amply supported by the evidence. The evidence is too voluminous to quote very extensively from it, and the trial court having heard it all as it came from the witnesses and having passed upon it, under the long-established rule of this court, we should hesitate before disturbing his findings. It is only where it is plainly shown that there is no substantial conflict in the evidence on the material issues, or the trial court has ignored the evidence entirely and rendered judgment without support from the evidence that this court will interfere and order a new trial. An examination of the evidence in this case discloses that there is direct conflict as to the employment of plaintiff, plaintiff insisting that his contract was that he should be paid what his services were reasonably worth, and defendants insisting that it was under the contract price of \$5 per day; A. W. Moore and Wilbur E. Moore so testifying.

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The seventh assignment is based on the ruling of the court on the objection of defendants to the admission of any evidence of any acts of Wilbur E. Moore tending to create any liability against the other defendants or against their property without proof of the agency of said Wilbur E. Moore and of his authority to make such contracts. It is shown by the evidence that Wilbur E. Moore was the only representative of the company with whom a contract could be made where the work was being done at or near the mines; he had charge of the check-book and says himself that he told plaintiff he could proceed with the work transporting the machinery. Other defendants were on the ground afterward and made no complaint that plaintiff had done or was doing the work; indeed, it is contended by defendants that he was employed to do this work by A. W. Moore, the only dispute being as to wages for the work. There is no error in this ruling.

The eighth assignment is based upon the ruling of the court in admitting any evidence showing or tending to show a lien upon the property of defendants under the complaint and notice of lien. We have already said the complaint was sufficient, and an examination of the Session Laws of 1899, page 148, section 6, convinces us that the lien complies with the requirements of the statute, hence no error in this ruling.

We now come to the most serious question presented by this record, and that is the sufficiency of the description of the property to be sold to satisfy the judgment, which is as follows: "It is adjudged and decreed that all and singular the ten-stamp quartz-mill building and tramway, situated upon the Crystal Butte and Wise Boy mining claims, lying and being in the Robbins mining district, Idaho county, Idaho, upon which plaintiff filed his notice of lien, and mentioned in plaintiff's complaint or so much of the land and premises upon which said mill building and tramway are situated as may be sufficient for the use and occupation of said mill building and tramway, to satisfy the amount due to the plaintiff from defendants on said judgment, interest and costs of this suit and expenses of sale, be sold at public auction by the sheriff of Idaho county, Idaho, in the manner prescribed by law, according to the course and practice of this court, etc."

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Under the head of "What land or interest therein is subject to lien," our lien law, and the law upon which the lien is founded, and this action is prosecuted, section 4 says: "The land upon which any building, improvement or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof *to be determined by the court on rendering judgment*, is also subject to the lien, etc."

It will be observed that the court did not comply with this provision of the statute and fix the amount of land that should be sold for the necessary requirements for the convenient use and occupation thereof, but left it to the sheriff to determine this question. The intention of the legislature in this provision of the law is obvious. The court has the power to call witnesses to ascertain the amount of land necessary for the convenient use and occupation of the property to be sold under the terms and conditions of the lien and judgment, whilst the sheriff has no such power. It was error on the part of the trial court not to comply with this provision of the statute, and the case is remanded, with direction to the trial court to ascertain the amount of land required for the convenient use and occupation of the property ordered sold under the lien, and if necessary, call witnesses for such purpose; and after such fact is ascertained make a proper finding and modify the judgment accordingly.

Other errors are assigned, but in our view of the case it is unnecessary to pass upon them. The judgment is affirmed with the above modification. Costs are awarded to respondent.

Sullivan, C. J., and Ailshie, J., concur.

Argument for Appellant.

(June 6, 1904.)

SPOTSWOOD v. MORRIS.

[77 Pac. 216.]

PLEADING—FACTS UNKNOWN TO PLAINTIFF—ELECTION BETWEEN COUNTS
—SALE OF LAND—AGREEMENT FOR COMMISSION.

1. In an action to recover commission for the sale of real estate under circumstances where the exact legal nature of plaintiff's right and defendant's liability depends upon facts within the peculiar knowledge of the defendant the plaintiff may set forth the same single cause of action in several counts and with different averments so as to meet the possible proofs which will appear on the trial. In other words, when a plaintiff has two or more distinct and separate reasons for the right to the relief he asks, or when there is some uncertainty as to the ground of recovery, the complaint may set forth a single claim in several distinct counts.

2. *Held*, that the complaint states a cause of action.

(Syllabus by the court.)

APPEAL from the District Court of Nez Perce County.
Honorable Edgar C. Steele, Judge.

Action to recover commissions for sale of real estate. Demurrer to complaint sustained and judgment of dismissal entered. Judgment reversed.

The facts are stated in the opinion.

I. N. Smith, for Appellant.

Where the facts, constituting the cause of action, are peculiarly within the knowledge of the defendants, the plaintiff is permitted to state his cause of action in as many forms as may be necessary to meet the contingencies of proof. A motion to elect should be denied. (*Rucker v. Hall*, 105 Cal. 425, 38 Pac. 962; *Whitney v. Railway Co.*, 27 Wis. 327; *Pomeroy's Remedies and Remedial Rights*, sec. 576; *Boone on Code Pleading*, sec. 26; *Wilson v. Smith*, 61 Cal. 209; *Longprey v. Yates*, 31 Hun, 432 (overruling former position); *Leonard v. Roberts*, 20 Colo. 90, 36 Pac. 880; *Supervisors of La Pointe v. O'Malley*, 46 Wis. 35, 50 N. W. 521. See discussions of rule, 5 Ency. of

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Pl. & Pr. 321-323.) The rule extends to permitting one cause of action to be stated both upon an express and an implied contract. (5 Ency. of Pl. & Pr., p. 324.) The rule is based upon the principles of equity. (5 Ency. of Pl. & Pr., p. 322, note "Double Aspect.") Where there is any conflict between the rules of law with the rules of equity, the rules of equity "shall prevail." (Idaho Rev. Stats., sec. 4020.) The supreme court of Idaho has sustained a complaint pleaded both in express and implied contract, to recover commissions on a real estate transaction. (*Smith v. Anderson*, 2 Idaho (Hasb.), 537, 21 Pac. 412.) If the facts be that the broker has a prospective customer with whom he is negotiating, and the owner, while such negotiations are pending, sells the property to that customer, clearly the owner is liable for the broker's commission, notwithstanding the broker had not found a purchaser ready, able and willing to take the property at the terms on which he held the property for sale. (*Von Tobel v. Stetson & Post Mill Co.*, 32 Wash. 683, 73 Pac. 788 (790); *Smith v. Anderson*, 2 Idaho (Hasb.), 537, 21 Pac. 412; *Plant v. Thompson*, 42 Kan. 664, 16 Am. St. Rep. 512, 22 Pac. 726; *Ratts v. Shepherd*, 37 Kan. 20, 14 Pac. 496; *Stewart v. Mather*, 32 Wis. 344; *Woods v. Stephens*, 46 Mo. 555; *Fischer v. Hall*, 91 Ind. 243; *Lockwood v. Rose*, 125 Ind. 588, 25 N. E. 710; *Sibbald v. Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441; *Reynolds v. Tompkins*, 23 W. Va. 229.) It is also well settled that in every case where the broker who has been employed to sell, introduces a purchaser to the owner, and through such introduction negotiations are begun which result in final sale to such person, the broker is entitled to his commission, although in point of fact the sale may have been made by the owner. (*Jones v. Adler*, 34 Md. 440; *Woods v. Stephens*, 46 Mo. 555; *Hafner v. Herron*, 165 Ill. 242, 46 N. E. 211; *Bash v. Hill*, 62 Ill. 216; *Loyd v. Matthews*, 51 N. Y. 124; *Lyon v. Mitchel*, 36 N. Y. 235, 93 Am. Dec. 502; *Young v. Hughes*, 32 N. J. Eq. 372; *Wilson v. Mason*, 158 Ill. 304, 49 Am. St. Rep. 162, 42 N. E. 134; *Keys v. Johnson*, 68 Pa. St. 42; *Pope v. Beals*, 108 Mass. 561; *Desmond v. Stebbins*, 140 Mass. 339, 5 N. E. 150; *Lincoln*

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v. McClatchie, 36 Conn. 136; *Dreisbeck v. Rollins*, 39 Kan. 268, 18 Pac. 187; *Scott v. Clark*, 3 S. Dak. 486, 54 N. W. 538 (540); *Scott v. Patterson*, 53 Ark. 49, 13 S. W. 419; *Fiske v. Soule*, 87 Cal. 313, 25 Pac. 430; *Leonard v. Roberts*, 20 Colo. 88, 36 Pac. 880; *Wood v. Wells*, 103 Mich. 320, 61 N. W. 503.) The defendants are a joint-stock company—that is to say, a partnership as to a third person, so far as their liabilities are concerned. (*Claggett v. Kilbourne*, 1 Black, 346, 17 L. ed. 213; 17 Am. & Eng. Ency. of Law, 2d ed., p. 636; *Carter v. McClure*, 98 Tenn. 109, 60 Am. St. Rep. 842, 38 S. W. 585, 36 L. R. A. 282; *Robinson v. Smith*, 3 Paige, 222, 24 Am. Dec. 212.) An unincorporated joint-stock company is governed by the legal rules applicable to partnerships. (*Allen v. Long*, 80 Tex. 261, 26 Am. St. Rep. 735, 16 S. W. 43; *Bullard v. Kenney*, 10 Cal. 60; *Butterfield v. Beardsley*, 28 Mich. 412; 17 Am. & Eng. Ency. of Law, 2d ed., p. 637, note 2 et seq.; *Webster v. Clark*, 34 Fla. 637, 43 Am. St. Rep. 217, 16 South. 601, 27 L. R. A. 126; *Spaulding v. Stubbins*, 86 Wis. 255, 39 Am. St. Rep. 888, 56 N. W. 469; *Goldsmith v. Eichold Bros. & Weiss*, 94 Ala. 116, 33 Am. St. Rep. 97, 10 South. 80.)

James E. Babb and Daniel Needham, for Respondents.

The court did not err in sustaining the motion requiring plaintiffs to elect between the several counts set forth in the complaint. (Pomeroy's Code Remedies, 3d ed., secs. 73, 576; *People v. Slocum*, 1 Idaho, 62.) The complaint contains four counts, setting up claims for recovery, but whether they are really one claim stated in different forms, or separate and distinct claims, it is difficult on reading the complaint to discover. The rule is that it is considered no variance from the proof if the facts show a substantial right to recover under the allegation, and the necessity of having various forms of stating the same cause of action is thus fully obviated. (*Smith v. Anderson*, 2 Idaho (Hasb.), 537, 21 Pac. 412.) Even if it had been error to order the plaintiffs to elect, they having preferred to make the election rather than have the entire complaint stricken out, made their election in open court, and chose

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to rest upon the second count of the complaint and the balance of the complaint was thereupon stricken out. The plaintiffs by their election waived any error in the order requiring them to elect. (2 Cyc. 644, 645, 1088; *Murphy v. Russell*, 8 Idaho, 133, 67 Pac. 425; *Pence v. Durbin*, 1 Idaho, 550.) It appears in paragraphs 3 to 7 of the complaint that the defendants constituted a voluntary unincorporated association, which is styled a "joint-stock company." (17 Am. & Eng. Ency. of Law, 2d ed., pp. 636-638, entitled "Joint-Stock Companies"; 4 Ency. of Pl. & Pr., p. 309, same title; 29 Century Digest, pp. 1511, 1512, same title; 4 Cyc. 308-310; *Sullivan v. Campbell*, 2 N. Y. Supp. (2 Hall) 295; *McConnell v. Denver*, 35 Cal. 365, 95 Am. Dec. 107; *Willis v. Greiner*, (Tex. Civ. App.), 26 S. W. 858.) On rehearing the court says: "It was such as the president and secretary had no authority to make. There is no evidence to show that the contract was ratified by the directors." (11 Am. & Eng. Ency. of Law, 2d ed., p. 1038, note 1.) The association, however, had the power to make the contract sued on and to confer the authority upon its president and secretary; but it is not shown that it ever did so. The secretary having been designated as the agent to make the sale, he has no authority to delegate his office and engage another to do so, and anyone relying upon a contract involving such a delegation, as the plaintiffs do in this case, must fail. Plaintiffs urge that authority to sell subject to direction of shareholders implies authority to delegate the power to another to do so and to make such delegation without the direction of the shareholders. (*Jones v. Brand*, 20 Ky. Law Rep. 1997, 50 S. W. 679; Mechem on Agency, sec. 185; 1 Am. & Eng. Ency. of Law, 378; *Barret v. Rhem*, 6 Bush, 466; *Rudd v. Railway Co.*, 7 Ky. Law Rep. 823; *Birch v. Powell*, 15 Ky. Law Rep. 455; *Bonwell v. Howes*, 2 N. Y. Supp. 717; *Corroll v. Tucker*, 21 N. Y. Supp. 952. See, also, concerning joint-stock companies, *M. W. Powell Co. v. Finn*, 198 Ill. 567, 64 N. E. 1036, 1037; *In re Pittsburg Wagon Works Estate, Appeal of Kountz*, 204 Pa. St. 432, 54 Atl. 316; *Appeal of Merchants' Fund Assn.*, 136 Pa. St. 43, 20 Atl. 527, 9 L. R. A. 421.) There are some authorities which apparently go so far

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as to hold that where a purchaser is introduced, if the seller makes a sale even for a less price than the list price with the agent, the agent is entitled to his commission. The authorities so holding, however, are very limited in number and are not founded on reason or on a careful discrimination of the authorities upon which they purport to be based. Authorities are frequently cited as so holding which contain no support for such a proposition. The authority which comes nearest holding this is *Hubachek v. Hazzard*, 83 Minn. 437, 86 N. Y. 426. Different authorities submit that there is no doctrine worthy of consideration creating a liability for commission where property has been listed at a definite price, unless a purchaser is produced willing to pay that price, unless only there is some wrongful or immoral conduct of the defendant in fraudulently selling at a lower price and attempting to make it appear that the purchaser was not one willing to pay the list price. In view of the multitude of cases upon these subjects, defendants' counsel will refer to only a sufficient number to clearly illustrate the principles to the court. One of the most extensive discussions of this question is found in the unanimous opinion of the court of appeals in *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441; *Ames v. Lamont*, 107 Wis. 531, 83 N. W. 780; *McArthur v. Slauson*, 53 Wis. 41, 9 N. W. 784. In *Jacob v. Shenon*, 3 Idaho, 274, 29 Pac. 44, in the syllabus it is stated that in such an action the complaint "must allege in direct and positive terms that the party of the second part did render services which resulted in the sale thereof, or that he produced a party ready, willing and able to purchase said property upon the terms named; otherwise it is insufficient." (*Sullivan v. Mulliken*, 113 Fed. 94, 51 C. C. A. 79; *Rees v. Pellow*, 97 Fed. 167, 38 C. C. A. 94; *Plant v. Thompson*, 42 Kan. 664, 16 Am. St. Rep. 512, 22 Pac. 726; *Fraser v. Wyckoff*, 63 N. Y. 445, 13 L. ed. 525; *Corbel v. Beard*, 92 Iowa, 360, 60 N. W. 636; *Barnes v. German Savings etc. Soc.*, 21 Wash. 448, 58 Pac. 569; *Von Tobel v. Stetson & Post Mill Co.*, 32 Wash. 683, 73 Pac. 788.) Denver Townsite Company, in its association name, was not a defendant in this action, and the judgment should not be reversed because of the court's refusal

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to grant the plaintiff a default as against Denver Townsite Company in its association name. (*Davidson v. Knox*, 67 Cal. 143, 7 Pac. 413; *Feder v. Epstein*, 69 Cal. 456, 10 Pac. 785; *Herron et al. v. Cole et al.*, 25 Neb. 692, 41 N. W. 765-767; *Hanna v. Emerson et al.*, 45 Neb. 708, 64 N. W. 229; 15 Ency. of Pl. & Pr. 850; *Peabody v. Oleson*, 15 Colo. App. 346, 62 Pac. 234; *Sawyer v. Armstrong*, 23 Colo. 287, 47 Pac. 391; Idaho Rev. Stats., sec. 4112.)

SULLIVAN, C. J.—This is an appeal from a judgment of dismissal given and entered after demurrers to the complaint were sustained. The action was brought to recover commission alleged to have been earned in a real estate transaction. It is alleged in the complaint that the defendants are a voluntary, unincorporated joint-stock company. The plaintiffs, who are appellants here, are real estate dealers. The defendants owned a large tract of land situated in Idaho county, which they, through their vice-president and secretary, placed with plaintiffs for sale at a specified price. Said contract was entered into in the month of May, 1902, and was for the sale of two thousand seven hundred and twenty and eighty one-hundredths acres of land, so as to net the defendants \$17.50 per acre and to pay the plaintiffs five per cent commission over and above that price.

It is alleged in the complaint that after the employment as aforesaid they entered upon the discharge of their contract and procured a purchaser for said lands who was ready, willing and able to purchase the same and pay therefor, and introduced said purchaser to the defendants through said association's vice-president; but that thereafter, and while plaintiffs were still negotiating with said purchaser for the sale of said lands, the defendants concluded and perfected a sale of said lands to said purchaser for the sum of \$47,000 on August 15, 1902; the same being a smaller sum than that for which the defendants had listed said land with the plaintiffs. That the plaintiffs thereafter demanded the payment of their commission, amounting to the sum of \$2,350, with interest at seven per cent per annum from August 15, 1902, no part of which has been paid. And

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by way of charging the same cause of action in a different form and as a second count, the appellant alleged after reiterating several allegations of the first cause of action or count, that the transactions had between the defendants and said purchaser, after the introduction of said purchaser to them by the plaintiffs, are peculiarly within the knowledge of the defendants, and for that reason plaintiffs ask to be permitted to and did state their cause of action on a *quantum meruit*, and allege that their services in procuring said purchaser were reasonably worth five per cent on the amount for which said lands were sold, amounting to \$2,350, and that the same had not been paid.

By way of charging the same cause of action in a different form and as a third count of the complaint, the plaintiffs reiterate numerous allegations found in the first cause of action, and aver that the transactions had between the defendants and said purchaser, after the introduction of the purchaser to said defendants by the plaintiffs, were peculiarly within the knowledge of said defendants; and plaintiffs therefore ask to be permitted to charge the same cause of action in a third form, and aver that by the various actions of the said defendants in so making such sale to such purchaser at a sum less than that to which said lands had been listed by the defendants to the plaintiffs, the plaintiffs became and were prevented from concluding the sale with the purchaser upon the terms and for the price which said lands had been listed with plaintiffs, and had thus prevented the plaintiffs from completing said sale and deprived them of their commission, and that by said acts of the defendants, plaintiffs became and were damaged by the breach of said contract by the defendants in the sum of \$2,350 with interest, and pray for judgment for that sum.

Thereafter the defendants moved that the plaintiffs be required to elect as between the three causes of action or counts stated in the complaint, and demurred to the complaint on several grounds. The court sustained the motion requiring the plaintiffs to elect, and they elected to stand on the second count of the complaint, and the other two counts were stricken out by order of the court. The court also sustained demurrers to the complaint. Counsel for appellants refused to amend the

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complaint and judgment of dismissal was entered, from which judgment this appeal is taken.

The appellants have specified seven (7) errors. The first is that the court erred in sustaining the motion to compel plaintiffs to elect. It appears from the complaint that the same cause of action is stated in three different counts. It appears from the allegations of the first count that the recovery is sought on the contract alleged to have been entered into for the sale of said real estate; and the allegations of the second count show that the recovery is upon a *quantum meruit*, and the third that the ^{defendants} were prevented from concluding the sale with the purchaser by the acts of the defendants by their selling the land to said purchaser at a lower price than they had listed it to plaintiffs, and that they were therefore injured in the amount of their commission, \$2,350.

It is contended by counsel for appellants that the facts constituting the sale of said real estate between the purchaser and the defendants were peculiarly within the knowledge of the defendants, and for that reason the plaintiffs are permitted to state their cause of action in as many forms as may be necessary to meet the contingency of the proof. In support of that contention counsel cites *Rucker v. Hall*, 105 Cal. 425, 38 Pac. 962, where it was held in an action to recover commissions for a sale of real estate under a contract for payment thereof at a certain rate if certain facts were true, and at another rate if other facts were true, and all the facts are peculiarly within the knowledge of the defendant, plaintiff may state his cause of action in different counts accordingly and should not be compelled to elect on which one he will proceed. Section 576 of Remedies and Remedial Rights, by Pomeroy, is also cited. *Inter alia*, the author there states: "Under peculiar circumstances, when the exact legal nature of plaintiff's right and of the defendant's liability depends upon facts in the sole possession of the defendant, and which will not be developed until the trial, the plaintiff may set forth the same single cause of action in varied counts and with different averments, so as to meet the possible proof which will for the first time fully appear upon the trial. This proposition is plainly just and right,

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and is sustained by the authority of able courts." It was held in *Wilson v. Smith*, 61 Cal. 209, under the Code of California which provides that the complaint must contain a statement of the facts constituting cause of action in ordinary and concise language, the plaintiff may set them out in two separate forms when there is a fair and reasonable doubt of his ability to safely plead them in one mode only. In 5 Encyclopedia of Pleading and Practice, page 321, the author states as follows: "When a plaintiff has two or more distinct and separate reasons for the obtainment of the relief he asks, or when there is some uncertainty as to the grounds of recovery, the complaint may set forth the same claim in several distinct counts or statements." Numerous authorities are cited in support of that statement.

In the case of *Smith v. Anderson*, 2 Idaho, 537, 21 Pac. 412, the cause of action was stated in two different counts, the first on a contract, the second upon a *quantum meruit*. But it does not appear to have been decided whether the plaintiff could have been compelled to elect on which count he would rely. Counsel for respondent cites in support of the action of the court in compelling the appellant to elect, section 576 of Remedies and Remedial Rights, and *People v. Slocum*, 1 Idaho, 62. In the latter citation it appears that a demurrer was interposed to the complaint, the third ground of which was that the complaint was ambiguous, uncertain, etc. Chief Justice McBride, in passing upon the demurrer, stated: "The complaint contains four (4) counts, setting up claims for recovery, but whether they are really one claim stated in different forms or separate and distinct claims, it is difficult on reading the complaint to discover. Whether the plaintiffs intend to say that they have suffered losses amounting in the aggregate of \$14,000, or whether they intend to fix them at \$8,000 or \$5,000 it is impossible to tell on a comparison of the counts with one another." And the demurrer was sustained on the ground of ambiguity and uncertainty. It is then stated by the learned chief justice that "The rule under the code allows a party to state as many causes of action as he may have if they are of a character to be properly combined in the same complaint, but it does not permit

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a party to set out the same cause of action under different forms." The last statement there made, to wit, that it does not permit a party to set out the same cause of action under different forms, was not necessary to a decision of the point there under consideration and was *dictum* and is overruled. We think that the rule is well settled by an overwhelming weight of authority that where a plaintiff has two or more distinct and separate reasons for the relief he asks, or when there is some uncertainty as to the grounds of recovery, that he may set forth such claim in several distinct counts or statements in his complaint. The court erred in compelling the plaintiffs to elect on which count of the complaint they would proceed.

The other errors assigned may be considered under the one assignment, to wit, that the court erred in sustaining the demurrers. It is shown by the record that counsel for defendants, after the motion to elect had been sustained by the court, and after counsel for appellants had elected to proceed on the second count of the complaint, filed their demurrers to said second count on the ground that it does not state facts sufficient to constitute a cause of action, and that the same is uncertain or ambiguous or unintelligent, in that it seeks a recovery upon an express contract for a certain sum, also on an implied contract for a reasonable sum; each of said grounds of recovery being inconsistent with the other.

While it is true that plaintiffs reiterate and repeat the allegations numbered 1, 2, 3, 4, 5, 6, 7, 8 and 9 of the first cause of action as the complaint stood after the election of plaintiffs to stand on the second count, those allegations must be considered as a part of the second count of said complaint. And as we have determined above that it was error to compel the plaintiffs to elect on which one of the counts they would proceed to trial, we must then consider whether the complaint as it originally stood states a cause of action, although the demurrer sustained by the court was aimed at the second count of the complaint alone.

After a most careful consideration of the allegations of the complaint viewed in the light of the very thorough and exhaustive oral arguments and briefs of respective counsel, we

Points decided.

conclude that the complaint states a cause of action, and there was error in sustaining said demurrers. We do not intend to, nor do we hold, that under the articles of association referred to in the complaint, that the vice-president and secretary of said association had the authority to list said real estate with the plaintiffs for sale; but we hold under all of the facts alleged in the complaint that a cause of action is stated, and if the defendants have a defense to said action it must be made by answer and proof. The judgment of dismissal must be reversed and the cause remanded with instructions to the trial court to permit the defendants to answer. Costs of this appeal are awarded to the appellants.

Stockslager, J., and Ailshie, J., concur.

(June 7, 1904.)

ROBY v. ROBY.

[77 Pac. 213.]

CASE HEARD ON DEPOSITIONS—WHEN RULE AS TO CONFLICT OF EVIDENCE DOES NOT OBTAIN—DIVORCE—WILLFUL DESERTION—WILLFUL NEGLECT.

1. Where a trial has been had entirely upon depositions, and the trial court has not seen and heard the witnesses, the appellate court is in as favorable position for judging of the truthfulness of the witnesses and the weight of the evidence as the trial judge, and will consider the same as if originally heard in the appellate court.

2. Where the husband establishes a new home and requests his wife to follow him to the new domicile, and furnishes her the means with which to travel, and she declines to take up her residence with him, the husband is not thereby guilty of deserting his wife.

3. Evidence examined and *held* insufficient to entitle the plaintiff to a decree of divorce.

4. A wife who willfully and without good cause refuses to follow her husband to the home and place of residence selected by him cannot obtain a decree of divorce from him because he fails to provide for her during the period of her refusal to reside with him.

Argument for Appellant.

5. Where the wife appeals in good faith and the district judge does not order the husband to pay a sufficient sum to defray the expenses of appeal, and it appears that the wife has not sufficient property or means for that purpose, this court will tax any deficiency against the husband to the end that justice may be done.

(Syllabus by the court.)

APPEAL from District Court of the Second Judicial District in and for the County of Nez Perce. Honorable Edgar C. Steele, Judge.

From a judgment denying and refusing a decree of divorce plaintiff appeals. Affirmed.

The facts are stated in the opinion.

George W. Tannahill, for Appellant.

Upon the question of willful neglect and desertion we respectfully refer to the following authorities: *Roycraft v. Roycraft*, 42 Cal. 444; *Washburn v. Washburn*, 9 Cal. 476; *Gill v. Gill*, 93 Md. 652, 49 Atl. 557; *Bergemier v. Bergemier*, 17 App. D. C. 481; *Howard v. Howard*, 134 Cal. 346, 66 Pac. 367; *Carey v. Carey*, 73 Cal. 630, 15 Pac. 313; *Vossburg v. Vossburg*, 136 Cal. 195, 68 Pac. 694-696; *Terrill v. Terrill*, 109 Cal. 413, 42 Pac. 137; *Duhon v. Duhon*, 110 La. 240, 34 South. 428. We also call special attention to an article in Central Law Journal of July 24, 1903, pages 63, 64, citing *Marsh v. Marsh*, 13 N. J. Eq. 281; *Harper v. Harper*, 29 Mo. 301; *Burns v. Burns*, 60 Ind. 259, and *Toulson v. Toulson*, 93 Md. 754, 50 Atl. 401, showing a relaxation of the rule as to the wife and more stringent to the husband. Upon the question of the payment of costs of appeal, we cite and respectfully refer the court to the following authorities: *Wisner v. O'Brien*, 56 Kan. 724, 54 Am. St. Rep. 604, 32 L. R. A. 289, 44 Pac. 1090; *Pleyte v. Pleyte*, 15 Colo. 125, 25 Pac. 25; *Lake v. Lake*, 17 Nev. 230, 30 Pac. 878; *Bohnert v. Bohnert*, 91 Cal. 428, 27 Pac. 732; *Larkin v. Larkin*, 71 Cal. 330, 12 Pac. 227; *People v. District Court*, 21 Colo. 251, 40 Pac. 460; *Rose v. Rose*, 109 Cal. 544, 42 Pac. 452; *Wolff v. Wolff* (Cal.), 37 Pac. 858.

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Charles L. McDonald, for Respondent.

It is a well-settled rule that it is the policy of the law to discourage divorce suits and not encourage them. (*Stover v. Stover*, 7 Idaho (Hasb.), 185, 61 Pac. 462.) Where a wife refuses to accept the provisions made for her support by the husband, but selects her own place of residence in contravention to his wishes, she cannot complain that he does not provide for her. (*Gray v. Gray*, 15 Ala. 779.) Willful neglect, whether accompanied with desertion or otherwise, is a distinct ground for divorce. The neglect must be such as leaves the wife destitute of the common necessities of life or such as would leave her destitute but for the charity of others. (*Washburn v. Washburn*, 9 Cal. 475; *Rycraft v. Rycraft*, 42 Cal. 444; *Page v. Page*, 51 Mich. 88, 16 N. W. 245; *Randall v. Randall*, 31 Mich. 194; *Stewart on Marriage and Divorce*, c. 281.) Desertion consists in the actual ceasing of cohabitation with the intent in the mind of the offending party to desert the other. (*Morrison v. Morrison*, 20 Cal. 431; *Stein v. Stein*, 5 Colo. 55; *Bennett v. Bennett*, 43 Conn. 313; *Rose v. Rose*, 50 Mich. 92; *Davis v. Davis*, 60 Mo. App. 545; *Serjent v. Serjent*, 33 N. J. Eq. 204; *Lynch v. Lynch*, 33 Md. 328; *Ruckman v. Ruckman*, 58 How. Pr. 278; *Thomas v. Thomas*, 4 Kulp (Pa.), 328; *Stewart on Marriage and Divorce*, c. 253; 9 *Ency. of Law*, 2d ed., 766, 781.) Refusal of wife to accompany husband on change of his residence followed by actual cessation of matrimonial cohabitation and unattended by any excusing circumstance is evidence of desertion by the wife and grounds for a divorce. (*Hardenbergh v. Hardenbergh*, 14 Cal. 654; *Schuman v. Schuman*, 93 Mo. App. 99.) The allowance of alimony in a divorce action is by our code left to the discretion of the trial court. (Idaho Rev. Stats., sec. 2472; 17 *Century Digest*, p. 967, and numerous cases there cited.)

AILSHIE, J.—This action was commenced in December, 1902, by the plaintiff praying a decree of divorce on two causes of action. The first cause of action charged willful neglect by the defendant to provide plaintiff with common necessities of life for a period of more than one year immediately preceding

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the commencement of the action, and the second cause was on the grounds of willful desertion. The defendant answered denying the charges, and by way of separate defense set up what was apparently intended as a plea of former adjudication. The case was referred to a referee who took the testimony and reported it to the court. After a consideration of the evidence the trial court made and filed his findings of fact and conclusions of law, which were adverse to all of plaintiff's allegations, and thereupon judgment was entered denying plaintiff any relief. This appeal is from the judgment and an order denying a motion for a new trial. Since the trial judge did not see the witnesses upon the stand and did not hear them testify, but determined the case on depositions, we are in as favorable a position to judge of their truthfulness and the weight to be given to the evidence as was the trial judge. In such case the rule that this court will not disturb the judgment where there is a conflict in the evidence does not apply. We have therefore made an original and independent examination of the evidence in the case with a view to determine its weight and preponderance. It is only necessary to recite briefly some of the leading facts of the case.

The plaintiff and defendant were married in 1883, and lived together on a farm until 1899, and reared three children. In 1899 they rented the farm and moved to the town of Orofino. In the spring or summer of 1900, the defendant went into the Pierce City mining district of Shoshone county, and found employment at what is known as the French Creek mines, at a salary of \$40 per month in the winter time and \$60 in the summer time, together with buildings and conveniences for a residence in the neighborhood of the mines. At this time, it seems, they had the two girls in school, one at Lewiston, Idaho, and the other at Uniontown, Washington, and the husband was paying the expenses. The youngest child, a boy about five years old, remained with the mother at Orofino. After securing employment and about the month of November, 1900, the defendant wrote to his wife and sent her the money necessary to pay her expenses in making the trip from Orofino to the place of his employment, and requested her to come to him. This the plaintiff did not do, but spent the money for other

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purposes and replied to him that she would not live in there and claimed that she could not make the trip at that time of year, and that it was not a fit or convenient place for her to reside with her minor child. No further communication took place between the parties, but some time thereafter, and in the following year, the defendant caused to be published in an Orofino paper a notice to the effect that his wife had refused to live with him and that he declined to be further responsible for any bills contracted by her. Matters ran along in this condition without further communication between them until about October, 1901, when, according to the separate defense of defendant, an action for divorce between these parties was tried in the district court upon the same grounds involved in the present action and which resulted adversely to the plaintiff. No written or personal communication seems to have taken place between them from that time up to July, 1903, when this cause was tried. It seems that the husband was still willing to support and care for his wife if she would take up her residence with him at the domicile he had selected, and still he has never manifested any great anxiety to have her with him by writing or communicating with her in any way. On the other hand, the wife seems to have been willing to live with her husband at Orofino or on the farm, or some other place which might be suitable to her, but still she did not seem to be pining on account of his absence. In the meanwhile the respondent was steadily employed and using his earnings to defray the expenses of keeping the two girls in school, while the wife was going from place to place working for different families and earning a reasonably fair livelihood for herself and minor child. She had also been given some money and clothing by her father and some by other relatives and friends. It seems from the evidence that she was fairly well provided with apparel fit to wear in public and to keep up appearances, while, on the other hand, she was very scantily furnished with clothing for comfort and protection from inclement weather. She claims that at the close of the first trial she made overtures to her husband to settle their differences and live together, but the evidence shows conclusively that whatever effort may

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have been made was done through her attorney and not by her personally. It would seem that the wife could better convey her feelings and sentiment in such a matter herself in person, and that if she were acting in good faith she would scarcely have cared to impose upon her attorney the delicate, if not pleasant, duty of wooing back her recreant husband. It is significant, at least, that there is nowhere shown any personal request or entreaty on her part for the return of her errant spouse. His absence, we are persuaded, was not very much "against her will." (*Schuman v. Schuman*, 93 Mo. App. 106.)

The principal point relied on by appellant is that owing to the ill-health of both herself and child the domicile selected by her husband was not a fit or proper place for them to live, and that the husband knew such fact and that his selection thereof amounted to a desertion. That by reason of the selection of such domicile and failure thereafter to provide for the wife while she lived apart from him he thereby became guilty of willful neglect. The evidence shows that for about five months of the year it is cold and disagreeable in the French Creek country and that the snowfall is from two to five feet and most of the travel for any distance is on snowshoes. It appears that other women live there contented with their families. It is no colder there than at many other places in the state. It appears, however, that very little is doing in society there and that the theater and ballroom have not yet made their appearance; nor have churches and schools yet been organized in the immediate neighborhood. These conditions, however, are not new to the pioneers of our western country. Counsel for respondent has so felicitously and eloquently and with reason portrayed this situation in his brief that we quote the following therefrom: "It is true, no doubt, that pleasanter places in which to reside could be found than that where the respondent was working, but the exigencies of business, the necessity of seeking employment where it can be found, frequently cause people to take up their residence at places where they would not live from choice. Yet to say that simply because of lack of society, churches, etc., at a place where a husband takes up his residence for the purpose of earning

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money for the support of his family, the wife can refuse to follow him and at the end of a year secure a divorce from him for desertion, or on the ground of neglect, when he cannot afford to support her at any other place, would place a premium on lethargy and deaden the ambitions of a man who desired to seek a place in the van of the onward march of civilization, where conditions at the time would be crude, and perhaps for that reason inhospitable. If such were the law, how would our western prairies and valleys ever have been settled by the daring pioneers who have built up this magnificent country? The history of every western state shows how sturdy emigrants, taking their families and possessions traveling in the humble ox-wagon, journeyed hundreds of miles into the then unknown west and set up their household gods in places where naught but vastness surrounded them; society, neighbors, schools and churches being unknown quantities; and these brave men, and still braver women, were the nucleus around which has grown up a country unexcelled in everything which goes to make it great. Would not the settlement of our frontiers have been retarded for generations if a wife could have refused to accompany her husband for the flimsy reasons attempted to be shown by the appellant herein?" The wife gives as an additional reason for not following her husband that she was suffering, and had been suffering for many years, from some ailments common to her sex, and that her little son was troubled with a cough which made it necessary for them to be where they could consult a physician. This has not been satisfactorily shown. It does not appear that she was under the care of a physician nor that she was suffering seriously from any ailment.

In this case we think the husband has taken about as little interest in his wife as she has manifested for him. If he had been more zealously concerned for the happiness and welfare of his wife, he would now, perhaps, have less cause for complaint. A little more consideration and forbearance on his part might have avoided, for them both, the wasting of their substance and revelation of their differences in the divorce courts.

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Under all of the facts in this case we think the trial judge did right in denying the divorce.

Appellant complains of some of the findings and the failure to make findings as to separate and community property. After the court found that no decree of divorce should be granted, it became unnecessary to find anything about the property owned by them or either of them.

The third finding which relates to the plea of a former adjudication became immaterial in this case because the facts were against the plaintiff on the merits. It is true there was no evidence justifying this finding and we are not informed how it came to be made. It could not have changed the decree whatever the findings might have been on this issue. The judgment was not based upon a former adjudication but upon the merits.

It is clear to us that when the defendant left his home and went to the mines to seek employment he had no intent of abandoning his wife; it is equally clear that he sent her the money in good faith with which to make the trip to his new home. While, to his discredit, he has failed to provide for her since her refusal to take up her residence with him, the law, however, for obvious reasons does not require a husband to provide for his wife so long as she declines without good cause to live with him. (*Page v. Page*, 51 Mich. 88, 16 N. W. 245; *Hardenberg v. Hardenberg*, 14 Cal. 654; *Schuman v. Schuman*, 93 Mo. App. 99; *Hagle v. Hagle*, 74 Cal. 608, 16 Pac. 518; *Beck v. Beck*, 163 Pa. St. 649, 30 Atl. 236.)

Appellant complains of the action of the trial judge in not making more liberal allowance for suit money and attorneys' fees for the prosecution of her action and the preparation and prosecution of her appeal. It seems that \$80 was allowed to cover all of plaintiff's costs for the trial in the lower court, and she managed to get along with that sum; but we are not informed as to just what the costs and expenses were there. She was also allowed \$75 to cover the expenses of prosecuting her appeal to this court. The transcript in this case covers one hundred and ninety-two printed pages and appellant's brief consists of fifteen printed pages. In addition to this is

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the expense of having the stenographer's notes extended, fees in this court and attorneys' fees. The record shows that the plaintiff has no separate property and is certainly not prepared to meet these heavy expenses. The amount allowed for the prosecution of the appeal would be exceedingly meager fees for the attorney in prosecuting the case on appeal. We shall therefore direct that in addition to the \$75 allowance already made, the costs of this appeal be paid by the respondent. Since we have reached the foregoing conclusion, it is unnecessary for us to consider any other matters discussed in the briefs. Judgment affirmed and costs awarded to appellant.

Sullivan, C. J., and Stockslager, J., concur.

(June 8, 1904.)

BECHTEL v. EVANS.

[77 Pac. 212.]

DISMISSAL OF APPEAL—SATISFACTION OF ORDER OR JUDGMENT—TAXING COSTS.

1. Where a party has collected a judgment in his favor, and by the prosecution of an appeal from such judgment, in seeking to gain more, thereby incurs the hazard of eventually recovering less, his appeal should be dismissed.

2. If, however, the appeal is from such an order or judgment that the appellant could in no event recover a less favorable judgment and that he incurs no hazard of ever obtaining less than the amount received or collected by him, the reason for the rule ceases and his appeal should be allowed.

3. A successful party should not be disallowed fees for witnesses who were subpoenaed and attended on the trial for the reason alone that they did not testify, but the party claiming fees for such witnesses should be required to make a satisfactory showing as to the reasons for their attendance and causes which made it necessary for them to testify.

4. Record in this case examined and held that there is no error in the order of the trial judge taxing costs.

(Syllabus by the court.)

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APPEAL from District Court in and for Nez Perce County. Honorable Edgar C. Steele, Judge.

From an order made after final judgment taxing costs, plaintiff appeals. Affirmed.

George W. Tannahill, for Appellant.

The supreme court of the state of Idaho has laid down the rule in the case of *Griffith v. Montandon*, 4 Idaho, 75, 35 Pac. 704, in which the court holds that witnesses who attend upon the trial of a cause and do not testify should receive their fees, provided it appears from the cost bill or affidavit attached thereto the reason why they were not sworn to testify in the cause. We see no reason why these witnesses who appeared in obedience to a subpoena, and were in attendance upon the trial of this cause, should not be allowed to collect and receive their fees. As authority upon this question we respectfully refer to *Cole v. Duchencau*, 13 Utah, 42, 44 Pac. 92; *Randall v. Falkner*, 41 Cal. 242; *Gilbert v. Kennedy*, 22 Mich. 5; *Lindy v. McChesney, et al.*, 141 Cal. 351, 74 Pac. 1034; *Raft River Land etc. Co. v. Tangford*, 6 Idaho, 30, 51 Pac. 1027; *Thiessen v. Riggs et al.*, 5 Idaho, 487, 51 Pac. 107; *Perham v. Portland General Electric Co.*, 33 Or. 451, 72 Am. St. Rep. 730, 53 Pac. 24, 40 L. R. A. 799; *Gray's Harbor Boom Co. v. McAmman et al.*, 21 Wash. 465, 58 Pac. 573; *Meyer v. City of San Diego et al.*, 132 Cal. 35, 64 Pac. 124; *Elliott v. Collins*, 6 Idaho, 157, 53 Pac. 453; *Ivall et al. v. Willis et al.*, 17 Wash. 645, 50 Pac. 467; *McGlaulin v. Wormser*, 28 Mont. 177, 72 Pac. 428.

Charles L. McDonald and Forney & Moore, for Respondent, cite no authorities upon the points decided by the court not cited by appellant.

AILSHIE, J.—This is an appeal from an order made after final judgment taxing the costs of the case. On the seventh day of December, 1903, judgment was rendered and entered in the district court in favor of the plaintiff and against defendant in the sum of \$400, and on the ninth day of the same month the plaintiff filed his memorandum of costs and disbursements

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claiming the sum of \$420.75 costs taxable therein. Thereafter, and on the fourteenth day of the same month the defendant filed his motion to have the costs taxed by the court and accompanied the same by the affidavit of his attorney, C. L. McDonald, Esq. The plaintiff filed a counter-affidavit, and on the twenty-eighth day of January, 1904, the matter was heard by the district judge upon the affidavits of the respective parties and the subpoenas and returns thereon which were among the files in the case. After the hearing the judge made an order disallowing the *per diem* and mileage for a number of character witnesses subpoenaed by the plaintiff and further reducing the *per diem* allowance for other witnesses, disallowing the cost bill in the total sum of \$181, and allowing it in the sum of \$239.75. The judgment was accordingly entered in favor of the plaintiff for the sum of \$239.75 costs. From this order the plaintiff on the second day of March, 1904, filed and served his notice of appeal. The defendant has moved to dismiss the appeal upon the grounds that the judgment has been paid and satisfied and that therefore the plaintiff cannot prosecute any further appeal. On this motion defendant has submitted a certified copy of the judgment docket of the district court, from which it appears that the defendant on the fourth day of February, 1904, paid in to the clerk of the district court the sum of \$646.80 in full of the judgment, costs and accrued interest to that date. On the same date this sum was paid over by the clerk to the attorney for the plaintiff and a satisfaction of the judgment was entered upon the docket and signed by plaintiff's attorney in the following words: "Received from J. R. Lydon, clerk of court, \$646.80 and judgment satisfied in said sum of \$646.80." It will be observed from the foregoing statement that the appeal from the order taxing costs was taken nearly a month after the plaintiff had received the amount of the judgment and entered this satisfaction thereof. The defendant rests his motion to dismiss the appeal upon the ground that the judgment having been paid and satisfied, the plaintiff cannot prosecute an appeal therefrom.

It seems to us, as a general proposition of law, that a successful party should not be allowed to gather in and enjoy the fruits of his judgment and thereafter prosecute an appeal and complain of error committed against him. (*Estate of Baby*, 87

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Cal. 200, 22 Am. St. Rep. 239, 25 Pac. 405; *Alexander v. Alexander*, 104 N. Y. 643, 10 N. E. 37; *Webster-Glover Lumber etc. Co. v. St. Croix County*, 71 Wis. 317, 36 N. W. 864; *Murphy v. Murphy*, 45 Ala. 123; *Corwin v. Shoup*, 76 Ill. 246 *Carll v. Oakley*, 97 N. Y. 633; *Moore v. Floyd*, 4 Or. 260; *Lamprey v. Henk*, 16 Minn. 405; *Buckman v. Etwood*, 44 Ill. 183; *Hall v. Lucy*, 37 Pa. St. 366; *Fly v. Bailey*, 36 Tex. 119; *Garner v. Garner*, 38 Ind. 137; *Indiana School Dist. of Altoona v. District Township of Delaware*, 44 Iowa, 201.)

Upon reason and principle, however, it appears to us that the test should be this: If the party has collected his judgment, and in seeking to gain more by the prosecution of an appeal thereby incurs the hazard of eventually recovering less, then his appeal should be dismissed. If, on the other hand, the appeal is from such an order or judgment as that he could in no event recover a less favorable judgment and that he incurs no hazard of ever receiving less than the judgment already collected by him, we see no objection to the prosecution of his appeal. (*Cowles v. Dickenson*, 8 Cow. 328; *Knapp v. Brown*, 45 N. Y. 207; *Alexander v. Alexander*, 104 N. Y. 645, 10 N. E. 37.)

In this case it should be observed that the appeal is not from the final judgment and is merely from the subsequent order made by the court striking \$181 from the cost bill. As the appeal comes to this court, however we might determine it, and whatever disposition we might make of the matter—the defendant not having appealed—plaintiff could in no event receive less than the amount allowed him by the district judge. This is not a case where a new trial could be ordered.

For the foregoing reasons we have examined the case on its merits as presented by this appeal. We do not think the court erred in its rulings in taxing costs. It is true the trial judge has not designated in his order the reasons for striking from the cost bill the items enumerated in the order; but having before us the affidavits and records which were considered by him, we infer that the reasons upon which the order is founded are those contained in the records and files considered. We agree with appellant in his contention that a successful party should not be disallowed fees for witnesses who are subpoenaed and at-

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tended upon the trial for the reason alone that they were not sworn and examined in the case, and we do not understand the case of *Griffith v. Montandon*, 4 Idaho, 75, 35 Pac. 704, as going to that extent. We do think, however, that where a party claims fees for witnesses who are not sworn and examined in the case, he should make a satisfactory showing as to the reasons for the attendance of the witnesses and the causes which made it unnecessary for them to testify. The principal objection made here by appellant is the refusal of the district judge to allow *per diem* and mileage for twelve witnesses who, it is claimed, were subpoenaed and attended for the purpose of meeting an anticipated attack upon the plaintiff's character, or rather his reputation.

After an examination of the respective affidavits, and in view of the weakness of the showing made by the plaintiff as to the reason for the attendance of these witnesses, and the strength of the counter showing by the defendant, we are not prepared to say that the trial judge committed any error in taxing the costs.

The order from which this appeal is prosecuted will be affirmed, and it is so ordered. Costs awarded to respondent.

Sullivan, C. J., and Stockslager, J., concur.

(June 8, 1904.)

RICHARDSON v. RUDDY.

[77 Pac. 972.]

**DISMISSAL OF APPEAL—CONTINUANCE—APPLICATION FOR—CONTRACT—
PARTITION OF REAL ESTATE.**

1. Under the provisions of subdivision 3 of section 3807 of the Revised Statutes, if an appeal from an interlocutory judgment is not taken within sixty days after such judgment is entered, the same will be dismissed on motion.

2. The action of the trial court in denying the motion for a continuance will not be reversed unless it appears that the court in denying such motion has abused its discretion.

Argument for Appellants.

3. In a suit for the partition of real estate among several parties, if it appears to the court that it is impracticable or inconvenient to make a complete partition in the first instance among all the parties to the suit, the court may direct a partition among two or more of the parties and from time to time thereafter may determine as to the other's rights, shares and interests, and render a further judgment directing a partition, in like manner, of all the undetermined parts and portions of the property.

(Syllabus by the court.)

APPEAL from District Court of Nez Perce County. Honorable Edgar C. Steele, Judge.

Action for partition of real estate. Judgment for plaintiffs. Affirmed.

George W. Tannahill, James De Haven and H. F. Burleigh, for Appellants.

This is a very peculiar case, and about the most charitable thing to be said of the complaint is that it is "fearfully and wonderfully made." The complaint was undoubtedly framed on one theory, the case tried on another and decided on another. The objection to the introduction of evidence should have been sustained for the reason it was not shown by the complaint that any act was ever done constituting Richard Ruddy a trustee, or how plaintiffs derived their interest in this tract of land, what their interests were, or any part of an agreement in writing or otherwise authorizing a partition of the land described in the complaint. It does not appear from the complaint that plaintiffs paid any part of the purchase price or did any act entitling them to any part or portion of the land in question. The decision of the court affirmatively shows that there was no agreement expressed, implied or otherwise, constituting Richard Ruddy a trustee for the plaintiff or any other person. It is a well-settled principle of law that the plaintiffs must recover upon the contract the agreement relied upon, and the case must determine all of the interests of the parties or it cannot be determined at all. This action cannot be determined without a determination of each and every right involved therein. Should this purported trust agreement be carried out as contended for

Argument for Respondents.

by the plaintiffs, as decreed by the court and as affirmatively shown by the records in this case, it would require about fifty acres more of land than there is involved in this action. The court has found the rights and shares to which it claims A. A. Kincaid, one of the defendants, and Walker Richardson, one of the respondents, are entitled to receive, and leaves the remaining shares and interests undetermined. We respectfully submit that a trust cannot arise or any interest be created without an agreement creating such a trust, and if the plaintiff recovers, he must recover on the agreement relied upon. If the evidence is insufficient to determine the rights of all the parties to the alleged agreement, it is insufficient upon which to base a decree, and the action should be dismissed. (*Hartshorn v. Smart*, 67 Kan. 543, 73 Pac. 73; *Chapman v. Allen*, 11 Wash. 627, 40 Pac. 219; Pomeroy's Equity Jurisprudence, 1040.) It is a settled rule of equity that all joint claimants must recover or none can. (*Richter v. Noll et al.*, 128 Ala. 198, 30 South. 740; *Love et al. v. Butler et al.*, 129 Ala. 531, 30 South. 735; *Lovelace v. Hutchinson*, 106 Ala. 417, 17 South. 623.) Upon the question of the insufficiency of the evidence we also invite the court's attention to section 6009, subdivision 9, Revised Statutes of Idaho of 1887. (*McGinness et al. v. Sanfield et al.*, 6 Idaho. 372, 55 Pac. 1020; *Coffin et al. v. Bradbury*, 3 Iowa, 770, 95 Am. St. Rep. 37, 35 Pac. 715; Brown on Statute of Frauds, secs. 266-269; *Leis v. Potter*, 68 Kan. 117, 74 Pac. 622.) There was no attempt to show that the property in controversy was described in any writing signed by the parties to be charged, or at all. This description must be proven, if at all, by parol evidence. We have searched the record in vain to find any reference whatever to the description of the land as it exists at the present time, or as it would be when divided, or at any other time. This being true, the plaintiffs have no standing in this court and have not made out a case. (*Carig et al. v. Zelian*, 137 Cal. 105, 69 Pac. 853.)

Clay McNamee and George W. Goode, for Respondents.

Appellants strenuously urge that the amended complaint is not good or sufficient. A careful examination of the transcript

Argument for Respondents.

discloses no demurrers on the part of any of the defendants, hence if the complaint is insufficient (and we maintain that it is sufficient) that point has been waived. (*Deuprey v. Deuprey*, 27 Cal. 329, 87 Am. Dec. 81.) In any event the complaint is sufficient and complies fully with the provisions of the statute and decisions. (Rev. Stats. 1887, sec. 4561; Knapp on Partition, pp. 102, 150, 152. Forms of complaint set out in Knapp on Partition, pp. 517, 518; also pp. 519-522; *Bradley v. Harkness*, 26 Cal. 69; *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671; *Hill v. Young*, 7 Wash. 33, 34 Pac. 144.) A complaint in partition is entitled to a most liberal construction by the court entertaining the same. (17 Am. & Eng. Ency. of Law, p. 731, and authorities there cited.) Appellants contend that the trial court erred in denying their motion for a continuance. There was no abuse of discretion by the court in this ruling, as the record discloses that all of the defendants or their respective counsel were fully apprised of the date set for trial; that this case had already been continued over at least four terms of the court either to accommodate defendants or their attorneys from time to time. The affidavits of counsel for defendants in support of said motion for continuance are entirely inadequate, in that they fail to show due diligence on their part, and in fact show an entire lack of diligence in securing the attendance desired. A motion for continuance is always properly denied when lack of diligence is shown, and this statement is borne out by an unbroken line of decisions in every state in the Union. (*Kuhland v. Sedgwick*, 17 Cal. 123; *Leszinsky v. White*, 45 Cal. 278; *People v. Jocelin*, 29 Cal. 562; *Pierson v. Holbrook*, 2 Cal. 598; *Frank v. Brady*, 8 Cal. 47; *Cody v. Butterfield*, 1 Colo. 377; *Kearney Stone Works v. McPherson*, 5 Wyo. 178, 38 Pac. 920.) A very liberal rule has been adopted by the courts in suits for partition in granting amendments to the bill of complaint. (Knapp on Partition, pp. 158, 159; *Storch v. McCain*, 85 Cal. 304, 24 Pac. 639; 1 Ency. of Pl. & Pr., pp. 516, 517; see authorities there cited.) In case of partition the interlocutory judgment must direct a partition, as between those whose share has been determined and the other parties to the action, leaving intact the share, interest or estate of those that

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are undetermined. And where the shares and interests of two or more parties have been ascertained and determined, the interlocutory judgment may also direct the partition among them of part of the property, proportionate to their aggregate shares; and the court from time to time may determine as to the other rights, shares and interests, and render another and further interlocutory judgment, directing a partition, in like manner, of the undetermined parts and portions of the same property. (Knapp on Partition, p. 211; Idaho Rev. Stats., 1887, sec. 4568; *Hayward v. Judson*, 4 Barb. 228.) Parol evidence is admissible establish a resulting trust, even though the trustee deny under oath; for the statute of frauds exempts such trusts from its provisions. (*Krauth v. Thiele*, 45 N. J. Eq. 407, 18 Atl. 351; *Cutler v. Tuttle*, 19 N. J. Eq. 558; Hill on Trustees, p. 92; *Tunnard v. Littell*, 23 N. J. Eq. 264; *Midmer v. Midmer*, 26 N. J. Eq. 299.) Parol evidence will be admitted to show that a purchase made in the name of one was a joint purchase at the cost of more than one and for the benefit of all, or that the consideration for a purchase was in fact paid by some other person than the one named in the deed of conveyance as grantee. (*Powell v. Monson etc. Mfg. Co.*, 3 Mason (U. S.), 347, Fed. Cas. No. 11,357; *Smith v. Eckford* (Tex. 1891), 18 S. W. 210.) A trust may be proved by circumstantial evidence, by admissions in the pleadings made either explicitly or by implication by the party sought to be charged, or by his admission elsewhere made. (*Davis v. Coburn*, 128 Mass. 377; *Massey v. Massey*, 20 Tex. 134; *McVay v. McVay*, 43 N. J. Eq. 47, 10 Atl. 178; *Allen v. Whithrow*, 110 U. S. 119, 3 Sup. Ct. Rep. 517, 28 L. ed. 90; *Gibblehouse v. Strong*, 3 Rawle (Pa.), 437.)

SULLIVAN, C. J.—This is an action brought under the provisions of title 10, chapter 5 of the Revised Statutes of Idaho, for the partition of certain real estate lying in Idaho county, and to have the defendant, Richard Ruddy, declared trustee for the benefit of plaintiffs and defendants named in the complaint. It is alleged in the amended complaint that the plaintiff, Walker Richardson, and the defendants, Richard Ruddy, E. Conrad, C. E. Newton and A. A. Kincaid, acquired title as joint tenants to the real estate described in the complaint and that they are

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now in possession thereof. That said premises were acquired by said plaintiff, Walker Richardson, and defendants from the United States government for the purpose of and as a townsite by filing certain government script with the proper United States officials and by payment of the sum of money required in such cases by the laws of Congress; that by agreement the recorded title to said premises was to be granted by the government to the defendant Ruddy, as trustee for said plaintiffs and defendants, and that he now holds the legal title to all of said premises.

The specific interests of the plaintiffs and defendants, so far as known, are alleged and set out in the complaint. The prayer is for a partition of said premises and that the defendant Ruddy be compelled, by proper decree, to execute and deliver good and sufficient deeds to both the plaintiffs and defendants to their respective interests in said land and for general relief. The defendants Ruddy, Jacobs, Marasseck and Conrad filed separate answers denying all allegations of the complaint; Kincaid filed his answer admitting all of the allegations of the complaint, and joined with the plaintiff in a prayer for a partition of the premises. The case was tried by the court without a jury, and an interlocutory decree entered by the court directing that upon the coming in of the report of the referees hereinafter referred to, that final judgment be entered as to Richardson and Kincaid. In said decree the court determined the interest of plaintiff, Walker Richardson, and defendant, A. A. Kincaid, and ordered a partition of said premises as to them, and appointed three disinterested freeholders to make said partition and a survey of the premises, if necessary, and report the result thereof to the court. The court made no findings or decree as to the interest of the other parties to this suit, but ordered on the coming in of the report of said referees that the action be severed, leaving the action to proceed as to the remaining parties to the suit. From said judgment and order overruling the motion for a new trial, this appeal is taken. Counsel for respondent moved to dismiss the appeal from the judgment on the ground that the judgment entered was not a final but an interlocutory judgment, and that the appeal was not taken within sixty days after entry of said judgment. The record shows that the judgment was

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filed October 15, 1903, and that the appeal was taken on the third day of February, 1904. The provisions of subdivision 3 of section 3807, Revised Statutes, provide, among other things, that an appeal may be taken from the district court to the supreme court within sixty days after the order or interlocutory judgment is made and entered. The appeal from said interlocutory judgment not having been taken within sixty days from the date of its entry, must be dismissed and said motion sustained. That leaves the appeal from the order denying a new trial to be considered.

It appears from the record that defendants interposed a motion for a continuance, which was denied by the court; this is assigned as the first error. We have examined the affidavits *pro* and *con* used on the application for a continuance, and we are unable to say that the court abused its discretion in overruling said motion.

It is also contended that the court erred in decreeing a partition so far as the plaintiff, Walker Richardson, and defendant, A. A. Kincaid, were concerned, leaving intact and undetermined the share, interest or estate of the other parties to the suit. Mr. Knapp in his work on Partition at page 211, says: "In such case the interlocutory judgment must direct a partition as between those whose share has been determined and the other parties to the action, leaving intact the share, interest or estate of those that are undetermined. And where the shares and interest of two or more parties have been ascertained and determined, the interlocutory judgment may also direct the partition among them of part of the property proportionate to their aggregate share; and the court, from time to time, may determine as to the other rights, shares and interests, and render another and further interlocutory judgment, directing a partition, in like manner, of the undetermined parts and portions of the property."

The provisions of section 4568 of the Revised Statutes provides for partial partition in cases of this kind. The court did not err in making the partial partition of said premises.

The plaintiff was permitted to amend the complaint in some minor particulars over the objection of counsel for the defend-

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ants, and it is contended that said amendments were not served on four of the defendants, which action of the court is assigned as error. The amendments referred to were made in open court during the trial of the case and the counsel for the defendants were present. After said amendments were allowed no continuance of the cause was asked for, and it is not intimated that defendants were taken by surprise and not ready to meet the complaint as amended.

The next error assigned relates to the insufficiency of the complaint. On an examination of its allegations we find that it states a cause of action and is amply sufficient. Many of the errors assigned relate to the admission of proof of a verbal contract for the conveyance of real estate. But the evidence clearly shows that this case does not come within the statute of frauds, and the admission of such evidence was not error.

A number of letters were introduced in regard to this real estate transaction. It was not error to admit said letters, as they referred to the transaction out of which this suit arose. The evidence is amply sufficient to sustain the findings and judgment of the court. After a careful examination of the complaint and the evidence introduced in support of it, we conclude that the complaint states a cause of action, and the findings and judgment are supported by the evidence. The judgment must be affirmed and it is so ordered, with costs in favor of the respondents.

Stockslager, J., and Ailshie, J., concur.

(August 10, 1904.)

ON PETITION FOR REHEARING.

[77 Pac. 973.]

STOCKSLAGER, J.—I have read the petition for rehearing in this case with much interest and care. Counsel for appellants urge as a reason why a rehearing should be granted that "only one of the respondents, Richard Ruddy, was represented by counsel present in court."

This question was passed upon by the district court. The judge of that court was familiar with all the facts and condi-

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tions, and within his discretion it seems he refused to grant a continuance. It is certainly well settled that this court will not disturb the action of the trial court in matters of this kind.

Many other reasons are urged why the judgment of the trial court should be reversed, but a careful study of the petition does not disclose any reason urged therein that was not fully passed upon in the original opinion. A rehearing is therefore denied.

Sullivan, C. J., and Ailshie, J., concur.

(June 9, 1904.)

PIONEER IRRIGATION DISTRICT v. CAMPBELL.

[77 Pac. 328.]

IRRIGATION BONDS—SURVEYS, MAPS AND PLANS.

1. Where an irrigation district has been regularly organized, and has had surveys, maps, plans and estimates made in accordance with the requirements of section 15 of the irrigation act (Sess. Laws 1903, p. 165), and a bond issue has been made, and the money raised thereon is not sufficient for the completion of the works planned, it is unnecessary to make a new survey and additional maps and plans as a prerequisite to the ordering and holding another election authorizing a further bond issue for completion of the works.

(Syllabus by the court.)

From a judgment confirming proceedings of the Pioneer Irrigation District in voting additional bonds and an order denying a motion for a new trial, an elector of the district appeals. Affirmed.

Smith & Plowhead, for Appellant, cite no authorities not cited in the opinion.

Rice & Thompson, for Respondent.

Session Laws of 1903, at pages 165 and 166, give the authority on which the board of directors acted in making this ad-

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ditional issue of bonds. A statutory procedure in holding the election appears to have been followed. The only one of any consequence from the plan originally adopted was the lowering of the grade of the Phyllis canal at its head at a cost of about \$20,000; that the board of directors had the power to make such slight allowances in their plan for the benefit of the district was held to be the law in the following cases: *Modesto Irr. Dist. v. Tregas*, 88 Cal. 334, 359, 26 Pac. 237; *Cullen v. Glendora Water Co.*, 113 Cal. 510, 39 Pac. 769, 45 Pac. 822, 1047.

AILSHIE, J.—This action was commenced by the directors of the Pioneer Irrigation District for the approval and confirmation of their proceedings for an issue and sale of the bonds of the district in the sum of \$40,000. The action was brought under section 16 of an act of the legislature approved March 9, 1903, entitled, "An action relating to irrigation districts and to provide for the organization thereof and to provide for the acquisition of water and other property and for the distribution of water thereby for irrigation purposes and for other and similar purposes." (Sess. Laws 1903, p. 167.) The petition alleges the organization of the district, and all the subsequent proceedings had in pursuance thereof, and the making of surveys, plans, maps, and estimates as provided by law, and the voting of bonds in the sum of \$207,555, and approval and confirmation thereof by the district court, and the affirmance of such judgment by the supreme court, as reported in *Pioneer Irr. Dist. v. Bradbury*, 8 Idaho, 358, 101 Am. St. Rep. 201, 68 Pac. 295. It is averred in the petition that the directors, in constructing the works as laid out by the surveys, maps, and specifications previously adopted, have exhausted the receipts from the sale of bonds originally issued, and that the works are not yet completed, and that the board of directors have made their estimate of the amount necessary for the completion of the works and system as planned, and that it will require the further sum of \$40,000 for such purpose. That after making such estimate they ordered and directed an election on the question of issuance of such additional bonds, and that upon such election the bond issue was authorized, and they thereupon prayed the court for an order confirming their pro-

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ceedings and approving the issuance of such additional bonds. As authority for this bond issue and the proceedings herein, the directors rely upon that portion of section 15 of the act, *supra*, which provides, "And whenever thereafter said board in its judgment deems it for the best interest of the district that the question of the issuance of bonds in said amount or any other amount shall be submitted to the electors, it shall so declare of record in its minutes, and may thereupon submit such questions to said electors in the same manner and with like effect as at such previous election." (Sess. Laws 1903, p. 165.) The appellant, Campbell, demurred to the petition in the trial court, and, after his demurrer was overruled, answered, denying, on information and belief, most of the allegations as to the necessity for an additional bond issue, and the regularity of the election thereon. After a trial the court found in favor of the district, and entered its judgment approving and confirming the proceedings. From this judgment, and an order denying motion for a new trial, this appeal has been prosecuted.

The only point made by appellant is that, before an additional bond issue can be voted or authorized under the statute as above quoted, additional plans, maps, and estimates must be made, and all the proceedings taken under section 15 of the act that are required to be originally taken by a newly organized district. An examination of that portion of the act referring to the construction of canals and irrigation works, and the issuance of bonds therefor, satisfies us that appellant's contention would be correct if the additional bond issue was for the construction of additional works. But where the money to be raised is for the completion of the works already planned, and for which the surveys, maps, and plans have been made, then there can be no necessity for again doing such work, and it would be a useless thing to require the district to go to the additional expense and trouble which would be entailed in so doing.

We see no reason for disturbing the judgment of the trial court as entered in this proceeding. Judgment affirmed, and costs awarded to respondent.

Sullivan, C. J., and Stockslager, J., concur.

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Argument for Appellant.

(June 10, 1904.)

COEY v. CLEGHORN.

[77 Pac. 331.]

**ORDER REFUSING TO RELEASE ATTACHED PROPERTY IS APPEALABLE—
A MOTION TO DISMISS APPEAL WILL NOT BE SUSTAINED WHEN.**

1. An order after final judgment refusing to release attached property is appealable under the statute of this state.

2. Where it is shown by the certificate of the judge and clerk of the court in the transcript that such transcript contains all the papers, pleadings, etc., used on the hearing of a motion to release certain property from attachment after final judgment in the lower court, and thereafter the judge and deputy clerk furnish certificates or affidavits that other papers were used on the hearing, this court will not dismiss the appeal, especially when it is shown that the missing paper was a part of the record evidence of the respondent; a certified copy should have been furnished for the record by the moving party.

(Syllabus by the court.)

APPEAL from District Court of Kootenai County. Honorable Ralph T. Morgan, Judge.

From an order overruling motion to release certain property from an attachment after final judgment, defendant appeals.

Edwin McBee, for Appellant.

The first reason assigned is that the order appealed from herein is not an appealable order. The constitution provides that "The supreme court shall have jurisdiction to review upon appeal any decision of the district court, or the judges thereof." (Idaho Const., art. 5, sec. 9.) The state provides that an appeal may be taken to the supreme court from a district court from any special order made after final judgment. (Rev. Stats. 1887, sec. 4807.) The supreme court of this state has held, and it has never been questioned, that it is a proper matter to be presented to the court as to whether or not property once seized under attachment or writ of execution should be released as exempt if claimed. The writ when once returned is no longer

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in the power of the sheriff. The property is in the custody of the court, and application for its release should be made to the court or judge. (*Roth v. Duvall*, 1 Idaho, 149.) No bill of exceptions is required on appeal from an order made after judgment. (*Thiesen v. Riggs*, 5 Idaho, 487, 51 Pac. 107.)

Charles L. Heitman, for Respondent.

An appeal from an order overruling a motion will be dismissed where the record consists of unidentified papers, strung together with nothing to indicate that they were used on the hearing, or that there was no other evidence before the court when it heard the motion. (*State v. Millis*, 19 Mont. 444, 48 Pac. 773.) Section 1739 of the Montana statutes, referred to in said case, is identical with section 4821, Revised Statutes of Idaho. (*Simons Hardware Co. v. Alturas Commercial Co.*, 4 Idaho, 386, 39 Pac. 553.) Respondent submits that there must in some manner be a proper identification or authentication, *founded upon personal knowledge*, of the evidence, documentary and oral, considered on appeal. (Hayne on New Trial and Appeal, sec. 264.)

STOCKSLAGER, J.—This action was commenced in the district court of Kootenai county. An attachment issued and was levied upon certain personal property alleged to belong to the defendant, who was at the time residing on the "Indian reservation" in Kootenai county. A trial was had and on the twenty-third day of October, 1903, the jury returned a verdict in favor of the plaintiff; and thereafter, and on the twenty-seventh day of October, 1903, judgment was entered on the verdict. On the twenty-third day of October, 1903, counsel for defendant filed a motion notifying the plaintiff and his counsel that on the twenty-seventh day of October, 1903, they would request the court for an order releasing from attachment certain property attached in the above-entitled action which defendant claimed as exempt under the provisions of the statutes, etc. The notice also provides that the motion would be made and based on the records and files in the action and upon the affidavit attached, which was the affidavit of defendant. This

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motion was heard on the fourth day of November, 1903, and the court ordered that the motion be overruled and denied, and further ordered that the stay of execution theretofore granted be vacated and set aside as to certain of the attached property, etc. On the thirty-first day of December, 1903, defendant served counsel for plaintiff with his notice of appeal to this court from the above order. March 30, 1904, respondent filed his motion to dismiss the appeal on the grounds: 1. That the order of the district court appealed from herein is not an appealable order; 2. That no good and sufficient record on appeal has been filed therein; 3. That the pretended record herein is not authenticated by a bill of exceptions or by the district judge who heard and determined said motion or by the clerk of the said district court; 4. That the pretended record on appeal does not contain all of the documents, evidence and matters and things which were heard and considered by the district judge on the hearing of said motion; 5. The said motion will be made upon the transcript on appeal herein and upon the certificate of Honorable R. T. Morgan, judge of the district court of the first judicial district of the state of Idaho, in and for the county of Kootenai, the affidavit of T. L. Quarles and the affidavit of James A. Foster, which certificate and affidavits are attached to this motion and made a part hereof.

Taking up this motion in the order named, we will first dispose of the first ground urged by respondent; that is, "That the order of the district court is not an appealable one." Subdivision 3 of section 4807 of the Revised Statutes provides that "An appeal may be taken from any special order made after final judgment." This provision of the statute disposes of this ground of the motion. It is shown by the record that final judgment was entered October 27, 1903, and the order appealed from was entered November 4, 1903.

The question upon which counsel for respondent relies for a dismissal of this appeal as shown by the brief is based upon the insufficiency of the record as shown by the transcript insisting that the certificate of Judge Morgan and the affidavit of Deputy Clerk Foster attached to his motion, show that all the papers used on the motion in the lower court are not brought

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to this court on the appeal. This presents a somewhat novel situation, and we are at a loss to know how to arrive at a true solution of the facts. It is shown by the transcript that the learned judge on the seventh day of March, 1904, made a certificate on the motion of defendant to have certain property levied upon herein released as exempt property. "The following pleadings, and none other, were considered by me in rendering a decision upon said motion, namely: The writ of attachment issued herein October 1, 1903, and the sheriff's return thereto, which said writ was filed on return October 5, 1903. The order made by me October 21, 1903, dissolving said attachment; writ of attachment issued herein October 21, 1903, together with sheriff's return thereto, which said writ was filed on return October 23, 1903. The notice of motion and affidavit in support of said motion for release of said property filed herein October 24, 1903; the affidavit of Edwin Doust in opposition to said motion filed herein November 3, 1903. The affidavit of J. B. Gilbert in opposition to said motion, filed herein November 2, 1903; the affidavit of W. E. Noe in opposition to said motion, filed herein November 2, 1903; the affidavit of R. T. Walls in opposition to said motion, filed herein November 2, 1903. The clerk of the court, through his deputy, James A. Foster, certifies to the same state of facts.

On the twenty-fifth day of March, 1904, Judge Morgan made a certificate which is attached to respondent's motion to dismiss, in which he certifies that on the hearing of the motion in the lower court above referred to, he took into consideration the evidence which had been theretofore introduced on the trial of the cause upon the merits in said action in said court, in which action the judgment was made and rendered in favor of the respondent herein and against the appellant herein on the twenty-seventh day of October, 1903. He further certifies that on such hearing there was introduced and read in evidence and considered the bill of sale from the appellant, George F. Cleghorn, to the Loy Hardware Company, a certified copy of which bill of sale is annexed to this certificate, marked exhibit "A" and made a part hereof. The certified copy of the bill of sale above referred to is dated March 24, 1904, and hence was not used in

Points decided.

evidence on the hearing of the motion in the lower court, as that hearing was on the fourth day of November, 1903, as shown by the certificate of the judge. If this bill of sale was a part of the evidence on the hearing in the lower court, it was the duty of the party introducing it to furnish a certified copy for the record; it was certainly no part of the duty of counsel representing defendant below, appellant here, to procure at his expense the evidence that should have been introduced in proper form in the court below; and under the circumstances in this case a motion for diminution of the record would have a better standing in this court than one to dismiss the appeal on this ground, urged by counsel for respondent.

The deputy clerk who made the certificate shown in the record also furnishes an affidavit which is attached to the motion contradicting his certificate as deputy clerk.

We think, under all the circumstances in this case, this motion should be denied, and the case heard on its merits at the next Lewiston term and the cause continued, and it is so ordered.

Sullivan, C. J., and Ailshie, J., concur.

(December 20, 1904.)

COEY v. CLEGHORN.

[79 Pac. 72.]

ATTACHMENT—MOTION TO DISSOLVE SHOULD BE SUSTAINED—DISCLAIMER OF OWNERSHIP NOT A BAR TO A FUTURE CLAIM OF OWNERSHIP.

1. Where it is shown that a party resides upon an Indian reservation in the state, and an attachment is levied upon his property situate upon such reservation, a claim that he is not a resident of the state must fail.

2. Where it is shown that an attachment was levied upon certain personal property exempt by law from seizure under an attachment or execution proceeding, and at the time the levy was made the attached party disclaimed ownership, thereafter the attachment is discharged on motion and a second writ of attachment is issued and levied on all or part of the property originally

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levied upon, and at the second levy the property is claimed under the exemption laws of the state. *Held*, that under the facts in the case his first disclaimer did not waive his right to claim under the exemption laws.

(Syllabus by the court.)

APPEAL from the District Court of Kootenai County. Honorable Ralph T. Morgan, Judge.

Appeal from an order after final judgment refusing to release personal property from attachment claimed under the exemption laws. *Reversed*.

Edwin McBee, for Appellant.

Charles L. Heitman, for Respondent.

STOCKSLAGER, J.—This case was before this court at the March term, 1904, at Lewiston, on motion to dismiss the appeal. For a full statement of the facts, see *ante*, p. 162, 77 Pac. 331. The case is now here for review on appeal from a certain order refusing to release certain personal property from attachment. The order appealed from is as follows:

“This cause came on to be heard in open court on the fourth day of November, A. D. 1903, on the motion of defendant to have certain property levied upon herein released as exempt property, Edwin McBee, Esq., appeared for the defendant and in support of said motion, and Chas. L. Heitman appeared for the plaintiff and in opposition thereto. The court being fully advised in the premises, ordered that said motion be, and same hereby is, overruled and denied. To which ruling the defendant, by his counsel, then and there duly excepted. It was further ordered that the stay of execution herein heretofore granted be, and the same is hereby, vacated and set aside as to the wheat and oats covered by the writs of attachment and writ of execution herein, and that the same be sold by the sheriff of Kootenai county without delay as perishable property.

“It is further ordered that the stay of execution as to the cattle, horses and farm implements heretofore levied upon be extended for the term of fifteen days from this date.

“It is further ordered that the defendant herein have ten days

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from this date in which to prepare, file and serve his bill of exceptions herein as to the refusal of the court to release said property as exempt property."

The motion referred to in the above order follows:

"To Chas. P. Coey, the Above-named Plaintiff, and to Chas. L. Heitman, His Attorney:

"You and each of you will please take notice that the above-named defendant will on Tuesday, October 27, 1903, at Rathdrum, Kootenai county, Idaho, request the above-named court at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard, for an order releasing from attachment certain property attached in the above-entitled action which defendant claims as exempt under the provisions of the statutes of the state of Idaho governing exemptions from attachment, said property being the property described in the affidavit annexed hereto and made a part of this motion. This motion will be made and based on the record and files in this action and upon the affidavit hereto attached. The affidavit referred to is that of George F. Cleghorn, the defendant, in the lower court, appellant here. It describes certain horses, cattle, grain, consisting of oats and wheat, one wagon, a McCormick harvester, harness, etc., and says that he is a married man, the head of a family and has resided in Kootenai county, this state, since March, 1902; that his occupation is farming; that on the twenty-first day of October, 1903, a writ of attachment was issued and levied upon his property. That he has not any farming implements exceeding in value the sum of \$300, including those attached and those not attached. No other horses or cows other than those attached, etc., and claims all the property attached under and by virtue of the exemption laws of the state of Idaho."

Ada Cleghorn testifies that she is the wife of appellant, and that she has read the affidavit of defendant and that the same is true of her own knowledge.

Appellant's counsel say in their brief that only two questions are presented by this appeal: 1. "Can appellant claim benefit of the exemption laws of Idaho while residing upon the Coeur d'Alene Indian Reservation within the limits of said county?" 2. "Should a claim for the statutory exemption be allowed to the

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defendant under the levy of the second writ of attachment after his failure to make such a claim as against the levy of the first writ of attachment, and after his disclaimer at the time of the first levy of ownership in the property attached?"

Taking up these questions in the order named, we find that counsel for appellant insists that appellant was a resident of Kootenai county and had been for two years residing on the Indian reservation in that county, and that such residence was a legal one. There is no dispute as to the fact that appellant is a married man and the head of a family.

Counsel for respondent does not contradict the fact that appellant was living upon the Indian reservation, but denies that he had or could acquire a legal residence in Kootenai county by residing upon the reservation. It seems to be conceded that prior to appellant's removal to the reservation he was a resident of Spokane county, Washington. If the appellant had a legal residence on the Indian reservation he is entitled to the exemption given him by the statute of this state.

In the case of *Francis et ux. v. Green & Green*, 7 Idaho, 367, 65 Pac. 362, decided by this court in 1901, all the parties to the suit being residents of the Fort Hall Indian Reservation, the question involved the settlement of the right of William and Sarah Francis to use the waters of a certain creek in the reservation and on reservation land. We quote from the opinion: "From the record it appears that the defendants entered into a contract with William M. and Sarah M. Francis, by which they agreed to pay the attorney's fee and costs in a certain case to be commenced in the district court between said William M. and Sarah M. Francis as plaintiffs, and one Goodenough as defendant, which action was for the purpose of settling the rights between said William M. and Sarah M. Francis to the use of the waters for irrigation and domestic purposes of Little Cottonwood creek. That said action was commenced and tried in the district court of Bannock county and the waters of said stream decreed to said parties."

Appellants contend that the property in controversy in this action being upon an Indian reservation, all the parties are trespassers and the courts have no jurisdiction to determine their respective rights.

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While it does not appear that any of the parties have acquired permission from the Secretary of the Interior, or from any other source, to reside upon or occupy their lands, it does appear they are all there, and that their rights to occupy such land has never been questioned by the government authorities or the Indians themselves, and the parties are subject to the same rules as though they lived upon the public domain.

It may be, and doubtless is, true that appellant was a trespasser upon the Indian reservation, but so long as the Indians themselves or the government does not complain, his creditors cannot seize his property exempt by law from attachment on the theory that he is not a citizen of this state whilst residing on the reservation. He is not then in violation of any statute of this state. He could not plead his residence on the Indian reservation in bar of any action that might be commenced against him, either civil or criminal, in the courts of Kootenai county. He is a resident of Kootenai county and entitled to his exemption provided by the statute of this state. (*Utah & Northern Ry. Co. v. William F. Fisher*, 116 U. S. 28, 6 Sup. Ct. Rep. 246, 29 L. ed. 542; *Truscott v. Hurlburt Land Co.*, 73 Fed. 62, 19 C. C. A. 374.)

The next question is, Could and did appellant waive this exemption by his statements to the officer at the time of the first levy of the attachment? He stated to the officers that none of the property levied upon was his. His counsel explains this statement by saying that defendant has made these transfers to secure indebtedness owing to other parties, and at the time of the first levy actually thought the transfers were valid, but after investigation and the advice of counsel found that they had not been delivered and there was no continued change of possession, and that said transfers were therefore of no effect as against attaching creditors. It is next insisted that even though he did make such statements at the time of the levy of the first attachment, and it would have been a bar to his claim of such property under the exemption laws, when that attachment was dissolved by order of the court it left the property and the parties to the action in the same condition as though no attachment had been issued and served; that when the sec-

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ond attachment was levied there was no disclaimer of ownership of the property attached, etc. The existence of these facts does not seem to be disputed by the affidavits or counsel for respondent. Counsel for respondent with equal earnestness and zeal insists that after appellant had once disclaimed ownership of the property he could not afterward be heard to claim it under the exemption laws. In support of this contention, he cites *Sebright v. Moore*, 33 Mich. 91. The syllabus says: "Estoppel; attachment; disclaimer; advising proceedings. *Syllabus*. "One who disclaimed ownership and advised an attachment of chattels as the property of another and consented to the levy is estopped from afterward setting up a claim of title as against such proceedings." He also cites *Butt v. Green*, 29 Ohio St. 667. The syllabus in this case follows: "Where an officer levied upon a horse belonging to an exemption debtor who thereupon demanded the exemptions allowed by law, and they then mutually agreed upon a proper time and place for the debtor to select and the officer to cause to be appraised the property of the debtor exempt from levy and sale, and the debtor purposely failed to be present and make selections at the time and place agreed upon. Held, that the debtor by such failure waived his right to select and hold as exempt the horse so levied upon."

These two authorities do not sustain the contention of learned counsel for respondent. It does not appear that appellant ever advised the levy upon this property, consented to such levy, or agreed to anything with the officer making the levy. He told the officer that the property belonged to other parties. It cannot be said that this misled the officer or the respondent in this action as the second attachment was levied upon most of the same property. We have examined the other authorities cited by respondent and do not think this case comes within the rule laid down in any of them unless it be the cases from Pennsylvania.

Mr. Freeman in his excellent work on Executions, in discussing the cases from that state, has this to say: "This rule does not seem to have its foundation in any provision of the statutes of that state. It results from the belief of the judges

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that the statutes were designed for the benefit of honest debtors, for those only who would not seek to avoid the operation of the writs directed against them. If, however, we conclude that the dishonest are not worthy of the benefits of the exemption laws, it still seems that we should not as judges enforce our peculiar ideas until they had met the expressed approval of the legislature. Judges ought not to pronounce sentence where the law has provided no penalty. Besides it must be remembered that one of the chief objects of these laws is to protect and provide for the debtor's family and that this object would be partially subverted by making the benefit of the law depend upon the character of the debtor." It is not disputed that if the appellant was a resident of the state of Idaho he was entitled to the exemption now claimed were it not that he had disclaimed ownership of the property in dispute at the time of the first levy.

All these facts being considered, and viewing the contested questions in the light we do, this judgment must be reversed, with costs to appellant.

Sullivan, C. J., and Ailshie, J., concur.

(June 11, 1904.)

KROETCH v. MORGAN, JUDGE.

[77 Pac. 19.]

NONSUIT—WRIT OF MANDATE—CAUSE REMANDED FOR A NEW TRIAL—DISMISSED ON OPENING STATEMENT OF COUNSEL FOR PLAINTIFFS TO JURY—WRIT ISSUED REQUIRING JUDGE TO RETRY THE ACTION.

1. At the close of plaintiffs' evidence, court granted motion for nonsuit and entered judgment of dismissal from which an appeal was taken. It was held on appeal that plaintiffs had made a *prima facie* case and cause was remanded for a new trial. Cause came on for retrial before court with jury, and after counsel for plaintiff had made his opening statement to jury the court sustained a motion to dismiss the action and entered judgment of

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dismissal. Thereupon a writ of mandate was prayed for to require court to proceed to try said action as directed by decision of appellate court. *Held*, that the writ should issue.

(Syllabus by the court.)

Charles L. Heitman, for Plaintiff, files no brief.

No Appearance for Defendant.

SULLIVAN, C. J.—This is an application for a writ of mandate to Honorable Ralph T. Morgan, judge of the district court of the first judicial district of the state of Idaho, and arises out of the suit of *Kroetch Bros. et al. v. Empire Mill Company et al.*, 9 Idaho, 277, 74 Pac. 868. This case was tried in said district court by said judge in the year 1903; and after plaintiffs had introduced all of their evidence, on motion of the defendants, a judgment of nonsuit was entered. From that judgment the plaintiffs appealed to this court and the opinion on that appeal is found as above stated. The judgment of nonsuit was reversed and the cause remanded. The cause thereafter came on for trial before said court on the sixteenth day of March, 1904, sitting with the jury. After the jury had been impaneled the attorney for the plaintiffs made his opening statement to them, at the close of which counsel for the defendant interposed a motion for a judgment based on the opening statement of counsel, which motion was sustained by the court and a judgment of dismissal entered, to all of which the plaintiff duly excepted. Thereupon an application was made for a writ of mandate to compel said judge to proceed and try said cause on the ground that said court, by the dismissal of said action, had failed to comply with the mandate of this court as expressed in the opinion aforesaid. In that opinion the court says: "Appellants assign thirty-nine errors in the rulings of the court in this case, the last one of which is directed against the action of the court in granting a nonsuit. Without discussing the evidence introduced, suffice it to say that the court erred in taking the case from the jury. Plaintiffs had made, at least, a *prima facie* case. They had shown a purchase of the property and introduced a bill of sale therefor, and proved that they had taken possession of the prop-

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erty and its conversion by defendants. This court has held that it is reversible error to grant a nonsuit where the plaintiff has made a *prima facie* case. . . . Since we have concluded that the judgment of nonsuit was erroneously entered and that the case must go back for trial, it becomes our duty under the law to pass upon each of the thirty-nine assignments of error. . . . The judgment is reversed and the cause remanded."

It will be observed from the above question that the court held in that opinion that the plaintiff had made a *prima facie* case and the cause was sent back to the district court for trial. And, as above stated, the court began the trial of said cause. After the impanelment of the jury counsel for appellant made his opening statement to the jury, which is before us; and, as we understand it, it covers and includes the facts presented by the evidence contained in the transcript on the former appeal. That being true, the court in entering said judgment of dismissal at that time failed to comply with the mandate of this court as expressed in said opinion. Upon that state of facts the peremptory writ of mandate must issue, directing said judge to proceed and try said cause.

In the issuance of said writ the court does not intend to intimate that the trial judge intended to disobey the mandate of this court as expressed in said opinion, but had taken the view that if every fact stated by counsel for plaintiff in his said opening statement to the jury were proved, the plaintiff would not be entitled to a judgment, and hence concluded that said statement contained other facts than those shown by the evidence presented on the former trial, and concluded that if said statements were all established by competent evidence, plaintiff would not be entitled to a verdict or judgment. But as this court had held, in its former opinion, that the plaintiff's evidence established a *prima facie* case, it was the duty of the court to proceed and retry the cause.

It is suggested under the provisions of section 4980, Revised Statutes, that this court should not issue the peremptory writ in the first instance on this application. The court considered that point and concluded that by the terms of the former opinion of this court in said cause the trial court was directed

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to proceed and try the same, and as it had failed to do so and had entered a judgment of dismissal without trying the cause, the court concluded to issue the peremptory writ. The writ must be allowed, and it is so ordered. Costs of this proceeding are awarded to the plaintiffs.

Ailshie, J., concurs.

STOCKSLAGER, J.—With the facts as they exist in this case, I concur in the conclusion reached.

(June 11, 1904.)

MEYER v. FIRST NATIONAL BANK OF COEUR
D'ALENE.

[77 Pac. 334.]

INJUNCTIONS—DISSOLUTION WITHOUT NOTICE—WILL NOT ISSUE
AGAINST NATIONAL BANKS—SUFFICIENCY OF SHOWING.

1. When the adverse party moves to dissolve a temporary injunction upon the papers on which it was granted, no notice is required to be given to the party who obtained the injunction: *Thayer v. Bellamy*, 9 Idaho, 1, 71 Pac. 544, approved and followed.

2. That portion of section 5242, United States Statutes (Comp. Stats. 1901, vol. 3), which provides that "No attachment, injunction, or execution shall be issued against such association (national bank) or its property before final judgment in any suit, action or proceeding in any state, county or municipal court," is a complete bar to the issuance of any such writ or order from a state court against a national banking association.

3. Complaint and affidavits examined and held sufficient to authorize issuance of injunction against all defendants except one named as a national bank.

(Syllabus by the court.)

APPEAL from District Court in and for Kootenai County.
Honorable Ralph T. Morgan, Judge.

Plaintiffs filed their complaint and affidavits praying a temporary injunction. On this showing a temporary injunction

Argument for Appellants.

was issued without notice to defendants. Upon application of defendants, without a counter showing and without notice to the plaintiffs, the injunction was dissolved, from which order plaintiffs appealed. Order modified.

The facts are stated in the opinion.

Charles L. Heitman, for Appellants.

The temporary restraining order in this cause should not have been dissolved by the district court because it appeared to the court that irreparable injury would be sustained by the party applying therefor, and there was an urgent necessity for restraining said respondents, there being no other adequate remedy. The temporary restraining order in this case was not to afford a remedy for the past injuries, the appellants not praying for damages, but to prevent imminent future and continued injury. (4 Field's Lawyer's Briefs, sec. 252; *Fonda etc. Ry. Co. v. Olmstead*, 84 App. Div. 127, 81 N. Y. Supp. 1041.) The general rule as to the dissolution of injunctions granted against several defendants jointly is that a dissolution will not be allowed until all the defendants implicated in the charge have fully answered, denying the equities of the bill. The rule is based upon the necessity of protecting the rights of complainant by retaining the injunction until the personal knowledge of all the defendants has been tested as to the facts alleged in the bill, and until this is done complainant has a right to insist upon the protection of the court. (High on Injunctions, sec. 1528; also *Page v. Vaughan et al.*, 133 Cal. 335, 65 Pac. 740.) The defendant failed to apply for the dissolution of the injunction in compliance with the long-established rules of equity. If the injunction be applied for before the answer it must necessarily be sustained on affidavit, and the defendant may resist it on the counter-affidavits; or if it has been obtained *ex parte*, he may move to dissolve it on counter-affidavits, or may wait until he has filed his answer and then move to dissolve. (*Adams' Equity*, p. 356; *Marks v. Weinstock Lubin & Co.*, 121 Cal. 53, 53 Pac. 362.) When the statute says "without notice" in section 4295 it does not mean "without appearance," which must be legally made by the defendant before he can voluntarily place himself within the juris-

Argument for Respondents.

diction of the court; and section 4892 should govern and control the appearance under section 4295, because said last section—4295—does not prescribe by what means the trial court shall acquire jurisdiction. (*Vrooman v. Li Po Tai et al.*, 113 Cal. 302, 45 Pac. 470.) To entitle a defendant to the dissolution of an injunction, he must deny the entire equity of the bill, directly and without evasion. (High on Injunctions, sec. 1475.) It was not necessary to show that the defendants were insolvent to entitle plaintiffs to an injunction against the raising of the level of the street in front of his hotel. (*Schaufele v. Doyle et al.*, 86 Cal. 107, 24 Pac. 834; *Crescent City Wharf etc. Co. v. Simpson et al.*, 77 Cal. 286, 19 Pac. 426.) An unlawful conspiracy to operate by continuous unlawful acts to the injury of the plaintiff or his property rights is a nuisance which equity will enjoin. (*Plant v. Woods*, 176 Mass. 492, 79 Am. St. Rep. 330, 57 N. E. 1011, 51 L. R. A. 340.) Restrictive covenants in deeds, leases and agreements limiting the use of land in a specified manner or prescribing a particular use, which create equitable servitudes on the land, will be specifically enforced in equity by means of an injunction, not only between the immediate parties, but also against subsequent purchasers with notice. (Pomeroy's Equity Jurisprudence, secs. 1339, 1342.) Nor is it necessary that the covenant whose enforcement is sought should run with the land so as to be binding in law upon purchasers, since equity will restrain purchasers with notice of the covenant from doing any act in violence of its terms, although the covenant may not run with the land, so that no action at law could be maintained thereon against purchasers. (High on Injunctions, sec. 1152; *Smithers v. Fitch et al.*, 82 Cal. 153, 22 Pac. 935; *Mott v. Ewing et al.*, 90 Cal. 231, 27 Pac. 194; Bispham's Principles of Equity, sec. 435, p. 560.) That one may have relief for trespass, it is enough to show *bona fide* possession of the premises, under claim and color of title. (*Kellogg v. King et al.*, 114 Cal. 378, 55 Am. St. Rep. 74, 46 Pac. 166.)

Fred L. Burgan, for Respondents.

The injunction should have been dissolved for the further reason that state and county courts have no authority and are
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forbidden to issue an injunction against a national bank. (See U. S. Rev. Stats., 43d Cong. 1873-75, p. 1019, sec. 5242; *Chesapeake Bank v. First Nat. Bank of Baltimore*, 40 Md. 269, 17 Am. Rep. 601.) The injunction was granted without notice to the defendants and a peremptory writ was issued, not an alternative, and no time or place was fixed when the defendants might make a showing why the injunction should not issue, and after service of summons and return by sheriff, and the service of the writ of injunction on all of the defendants, the respondents applied to the court for a dissolution of the same upon the files and records as used by the appellants to secure the order of injunction, and as the records show that respondents introduced no evidence, filed no answer, but made their motion purely upon the records made by the appellants, respondents submit that their proceeding was entirely within "the long-established rules of equity," and in strict conformity with the statutes of Idaho as construed by the supreme court of this state. (Rev. Stats., sec. 4295; *Thayer v. Bellamy*, 9 Idaho, 1, 71 Pac. 544; *Leitham et al. v. Cusick et al.*, 1 Utah, 242.) The matter of continuing or dissolving an injunction is largely within the sound discretion of the court, and will not be reversed by the appellate court unless gross abuse of such discretion is shown. (*Mark v. Weinstock, Lubin & Co.*, 121 Cal. 53, 53 Pac. 362, cited by appellants; *High on Injunctions*, 899.)

AILSHIE, J.—This action was commenced against the First National Bank of Coeur d'Alene and S. A. Varnam. Plaintiffs filed their complaint and supported the allegations thereof by five separate affidavits, and on the showing so made the district judge issued an injunction against defendants, enjoining and restraining them from further commission of the acts threatened and of which the plaintiffs complained. The injunction was served upon the defendants on the eleventh day of January, 1904, and thereafter, and on the thirteenth day of the same month, the defendants applied to the judge who ordered the writ for a dissolution thereof. This motion was made without notice to the plaintiffs and upon the papers used in obtaining the injunction in the first instance. After hearing the application of the defendants, the district judge made an

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order dissolving the injunction upon the grounds that it had been issued "without sufficient ground and that no sufficient ground to warrant interposition of the court of equity is alleged in the complaint and moving papers of the plaintiff herein, and plaintiffs have a plain, speedy and adequate remedy at law." From the order thus made dissolving the injunction this appeal has been taken.

Plaintiffs' first assignment of error is "that the court erred in dissolving the injunction without notice to the plaintiffs and without giving plaintiffs an opportunity to be heard in opposition to said motion." There is no merit in this assignment. We disposed of this question in *Thayer v. Bellamy*, 9 Idaho, 1, 71 Pac. 544, where it was said: "When the adverse party moves to dissolve a temporary injunction upon the papers upon which it was granted, no notice is required to be given to the party who obtained the injunction, and no further showing can be made in opposition to such motion." (See Rev. Stats., sec. 4295.)

The other assignments made by appellants go to the merits of the case. The respondents, however, have presented a valid and sufficient reason for the dissolution of the injunction as to the defendant bank at least. They rely upon section 5242 of the United States Statutes (3 Comp. Stats., 1901), which, after making certain provisions against preferences in favor of creditors of national banks, concludes with the following prohibition: "And no attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action or proceeding in any state, county, or municipal court." This statute is a complete bar to the issuance of an injunction by a state court against a national banking association. This view has been held by the courts so generally and uniformly that it requires no discussion here. (See *Pacific Nat. Bank v. Mixter*, 124 U. S. 721, 8 Sup. Ct. Rep. 718, 31 L. ed. 567; *Freeman Mfg. Co. v. National Bank*, 160 Mass. 398, 35 N. E. 865; *Dennis v. First Nat. Bank of Seattle*, 127 Cal. 453, 78 Am. St. Rep. 79, 59 Pac. 777; *Garner v. Second Nat. Bank of Providence*, 66 Fed. 369; *Chesapeake Bank v. First Nat. Bank of Baltimore*, 40 Md. 269, 17 Am.

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Rep. 601; *National S. Bank v. Butler*, 129 U. S. 223, 9 Sup. Ct. Rep. 281, 32 L. ed. 682.)

For the foregoing reason alone the injunction was properly dissolved as against the bank. The same reason, however, could not be urged for dissolving the injunction as to the defendant Varnam. The complaint, after alleging the corporate existence of the bank, shows that in June, 1903, the plaintiff, Edwin N. La Veine, entered into an agreement of lease with one P. J. Scallon, who was then the owner of the leased premises, whereby La Veine leased from the said Scallon three office rooms in Coeur d'Alene city for the period of one year, with the option of continuing the lease for the further period of one year upon the same terms and conditions. Thereafter, and on the 10th of July, 1903, La Veine sublet two of the office rooms to the plaintiff, M. M. Meyer—subletting of the premises having been authorized by the lease. The rents were paid from time to time as they became due and the plaintiffs had installed their furniture and opened up business in the offices. Thereafter, and prior to the commencement of this action, the defendant, First National Bank, purchased from Scallon the property leased to and occupied by plaintiffs. It is then charged that the defendant Varnam, under contract with, and employment by, the defendant bank, on or about the nineteenth day of December, 1903, began to make changes and repairs about the building, and in doing so tore down and destroyed the partition between those rooms and adjoining rooms and injured and damaged some of the plaintiff's personal property and office furniture and made excavations in front of the offices so that the patrons and clients of the plaintiffs could not reach their offices and place of business, and that in pursuance of the purposes and designs of the defendants, Varnam had commenced the construction of a large brick wall which he threatened to build into and through the offices and rooms occupied by the plaintiffs and thereby render the offices unfit for use and occupation. It is also alleged that the defendant bank had threatened to oust and eject the plaintiffs from the rooms occupied by them, and that they were maliciously and willfully committing various trespasses for the purpose of annoying and disturbing the plaintiffs and of eventually driving them from

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the offices and rooms rented by them. It is also charged that these acts were done in pursuance of a conspiracy entered into between the bank and Varnam. It also appears that either Varnam or the bank officials had caused the water hydrants to be disconnected, thereby shutting off the plaintiff's water supply.

The willful commission of trespasses is outside of and beyond the authority and scope of powers granted to national banks, and becomes the personal and individual act of the officers or persons who commit or threaten to commit the same. We cannot see how a national bank, as such, can threaten to commit a trespass, but we can understand how its officers might do so and for such acts they would be personally liable. It was evidently the purpose of Congress to prohibit attachments and injunctions issuing from state courts against national banks, and it is equally certain that the purpose was not to protect them in the commission of torts and trespasses, but rather to prevent any interference with the legitimate business for which such banks are organized.

The complaint states a cause of action and upon its face entitled plaintiffs to a temporary injunction against the defendant Varnam. The contention of defendants that plaintiffs have an adequate remedy by an action at law and cannot therefore resort to an equitable remedy is not well founded. It is true that they have their remedy for damages, but under our statute, section 4288, Revised Statutes, a party is not under the necessity of waiting till his property has been damaged and destroyed and his business disorganized and his premises encroached upon to the extent of his own ouster and then resorting to an action at law for redress. In *Staples v. Rossi*, 7 Idaho, 618, 65 Pac. 67, this court laid down the rule under our statute as follows: "Injunctions will issue to restrain temporarily an act which will result in great damage to the plaintiff, although the injury is not irreparable, and notwithstanding that other remedies lie in behalf of plaintiff."

The order appealed from will be affirmed as to the defendant bank and reversed as to defendant Varnam. Costs awarded to appellants.

Sullivan, C. J., and Stockslager, J., concur.

Argument for Appellant.

(June 13, 1904.)

FELTHAM v. BOARD OF COMMISSIONERS, WASHINGTON COUNTY.

[77 Pac. 332.]

BOARD OF EQUALIZATION—APPEAL FROM ORDER OF.

1. Section 1776, Revised Statutes, as amended at the Session of 1899, providing for appeals from the order of boards of county commissioners, does not authorize an appeal from an order of a board of equalization.

2. The county board of equalization is a constitutional board exercising powers and duties separate and distinct from those exercised by the board of county commissioners.

(Syllabus by the court.)

APPEAL from District Court in and for Washington County. Honorable George H. Stewart, Judge.

From an order made by the board of equalization directing the assessment of the capital stock of the Washington County Abstract Company against the stockholders thereof the stockholders appealed to the district court. The district court ordered the assessment canceled, and directed that the property (abstract-books) of the corporation be assessed to the corporation. From the judgment of the district court the abstract company appealed. Reversed.

Lot L. Feltham, for Appellant.

The district court has not original jurisdiction over the matter of equalization of taxes. If objection is made by a person to the assessment of his property, he must first appear before the board of county commissioners, sitting as a board of equalization at a place and time fixed by statute, and there enter his protest. The board has exclusive original jurisdiction over the subject matter, and until they act no other court in this state has jurisdiction of the matter. When they act and decide the question submitted to them, then the aggrieved party may appeal from their decision in the matter and have the question retried in the district court. The jurisdiction of the dis-

Argument for Respondent.

strict court then is purely appellate. In order for it to have jurisdiction over the subject matter, someone must bring the question up on appeal as provided for in the Session Laws of 1899, Pinney's edition, page 364. Said court cannot assume that the board of commissioners have erred in their action in some particular and then proceed to correct their decision. Its jurisdiction does not extend over such matters except when some party to the proceedings below or a taxpayer on behalf of the county perfects an appeal from such decision of the board and presents the question regularly before the district court on appeal. (*Morse v. Presby*, 25 N. H. 302; *Northout v. Lemery*, 8 Or. 317.) The court cannot act upon persons who are not legally before it, upon one who is not a party to the suit, upon a plaintiff who has not invoked its arbitrament, or upon a defendant who has never been notified of the proceeding. It cannot adjudicate upon a subject which does not fall within its province as defined or limited by law. Neither can it go beyond the issues and pass upon a matter which the parties neither submitted nor intended to submit for its determination. (1 Black on Judgments, 1891 ed., pp. 261, 267, 328, secs. 215, 219, 220, 270; *Horner v. Doe*, 1 Smith (Ind.), 10; *Ford v. Doyle*, 37 Cal. 346; *McCoy v. Allen*, 16 W. Va. 731; *Shinn v. Board of Education*, 39 W. Va. 506, 20 S. E. 604; Freeman on Void Judicial Sales, pp. 8, 12, secs. 3, 5; *People ex rel. Union Trust Co. v. Coleman*, 126 N. Y. 433, 27 N. E. 818, 12 L. R. A. 762; Desty on Taxation, sec. 74.)

John A. Bagley, Attorney General, for Respondent.

The appeal from the order of the board of equalization to the district court brought the entire record up for trial *de novo*, or it was an attempt to appeal from a nonappealable order and should have been dismissed. The entire record was before the court for a trial *de novo*. (*Campbell v. Board of Commrs.*, 5 Idaho, 53, 46 Pac. 1022.) The officers and stockholders of the appellant company, in the name of the company by Lot L. Feltham, their attorney, commenced this proceeding when it applied to the board of equalization to strike the assessment of their abstract-books from the assessment-roll. The district

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court had jurisdiction of the entire matter. (Pol. Code, secs. 1608-1611; *Van Camp v. Board of Commrs.*, 2 Idaho, 29, 2 Pac. 721; *Rupert v. Board*, 2 Idaho, 19, 2 Pac. 718.) If the entire record was not before the district court, it was an attempt to appeal from a nonappealable order and should have been dismissed. The board of equalization had no authority to strike the assessment of the appellant company's books and records from the assessment-roll. Its order to have this done was void. The legislature has provided a system of levying, equalizing and collecting taxes. (Pol. Code, secs. 1311-1457, inclusive.) The system is complete and excludes all matters not included. The county board of equalization's duties are prescribed in the laws of this state. (Pol. Code, secs. 1372-1383.) No power is given to the board of equalization to strike property legally assessed from the assessment-roll. An appeal does not lie from an order of the county board of equalization to the district court. The board of county commissioners and the county board of equalization are two separate and distinct bodies, created by different acts of the legislature. The right of appeal given by the statute from an order of the board of commissioners does not imply the same right to appeal from the order and decision of the board of equalization. (*General Custer Min. Co. v. Van Camp*, 2 Idaho, 40, 3 Pac. 20.)

AILSHIE, J.—This appeal is prosecuted by the Washington County Abstract Company, Limited, a corporation organized and existing under the laws of this state. On the eighteenth day of July, 1903, the appellant, through its attorney, appeared before the board of commissioners of Washington county, then sitting as a board of equalization, and made application to the board to strike from the assessment-roll of the county for the year 1903 the assessment of the abstract-books belonging to the appellant and assessed at the sum of \$1,000. After a hearing the board granted the petition and ordered the assessment stricken from the roll. On the same day the board of commissioners, sitting as a board of equalization, ordered that the individual stockholders of the capital stock of the appellant corporation be assessed according to the number of shares held by each in the aggregate sum of \$1,000, which was

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the valuation placed upon the abstract-books, and thereupon ordered that notice of such action be given by the clerk to each of the stockholders. After the service of notice, and on the twenty-seventh day of July, 1903, the stockholders appeared before the board and filed their written application asking the board to strike from the assessment-roll the assessment made against them on their stock held in said corporation. This application was refused and denied, and the stockholders, five in number, appealed to the district court. When the matter was called for hearing in the district court the county attorney moved to dismiss the appeal upon two grounds, the second of which is, "That the court has no jurisdiction in said pretended matter of appeal for the reason that no appeal is allowed by law in the state of Idaho in any matter coming before and passed upon by the board of equalization." This motion was overruled by the court, to which ruling the county attorney took his exception. The court thereafter proceeded to hear the appeal upon its merits, and on the fourth day of November, 1903, made and filed his findings of fact and conclusions of law and entered a judgment directing that the order of the board of equalization assessing the stock of the corporation to the stockholders be vacated and set aside, and that the original assessment of \$1,000 against the Washington County Abstract Company be reinstated as the assessment against said corporation. From that part of the judgment reinstating the assessment against the abstract company, the corporation has appealed. On this appeal it is contended by the appellant that the district court entered its judgment, as against the appellant, without jurisdiction, and that the judgment is therefore void in so far as it ordered the reinstatement of the assessment against the corporation. It will be observed that the county did not appeal from the order of the board of equalization directing the cancellation of the assessment against the abstract company. On the other hand, the stockholders in their individual capacity did appeal from the order of the board directing an assessment against them to the amount of the stock held by each in the corporation. On the appeal to this court the county, through the attorney general, has again raised the

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question that the district court was without jurisdiction to enter any judgment or order of any kind in the premises except to dismiss the appeal in the first instance, for the reason that under the laws of this state no appeal will lie from an order or proceeding of a board of equalization.

The appeal from the order of the board of equalization taken in this case was taken under the provisions of sections 1776 to 1779, Revised Statutes, as amended by act of February 14, 1899 (Sess. Laws 1899, p. 248.) By section 1776 it is provided that "An appeal may be taken from any act, order or proceeding of the board, by any person aggrieved thereby or, by any taxpayer of the county when any demand is allowed against the county or when he deems any such act, order or proceeding illegal or prejudicial to the public interests." The section to which the foregoing is an amendment is found in chapter 2 of title 11 of the Political Code of 1887, and it should be observed that that chapter is devoted exclusively to the duties and powers of the board of county commissioners when acting as such a board, and does not undertake to prescribe their powers and duties as a board of equalization.

Section 25 of the county commissioners' act of the Compiled Laws of 1874, page 529, provided for appeals from orders of the board of commissioners as follows: "Appeals may be taken from orders of the board of county commissioners as follows: 1. From an order by any person aggrieved thereby; 2. From an order allowing any account or demand against the county by any elector or taxpayer of the county, on the ground of improper or excessive allowance; 3. From any order prejudicially affecting the public interest, by either the district attorney or probate judge of the county on behalf of the county."

Under that provision it was held by the territorial supreme court in *General Custer Min. Co. v. Van Camp*, 2 Idaho, 40, 3 Pac. 22, that an appeal would not lie from an order of the board of commissioners when acting as a board of equalization. Judge Prickett discussed the matter and set forth the conclusion of the court thereon very ably and clearly as follows: "It seems quite clear that the board of county commissioners and the board of equalization are two separate and distinct bodies, created by different acts of the legislature; that by section 22 of the revenue

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law, persons holding the office of county commissioners by election or appointment are invested with another distinct office having a different name. The revenue act, complete in itself, provides what duties the board of equalization shall perform. It requires them to meet and discharge these duties at a time not fixed by law for a meeting of the board of commissioners. It provides them with a clerk, and designates him as the clerk of the board of equalization; and, although the two boards are composed of the same persons, they are as completely different in respect to organization, powers and duties as if composed of different individuals. There being two separate boards, the right of appeal given by statute from orders of the board of commissioners does not imply the same right from the orders and decisions of the board of equalization." That decision has never been questioned in this state, and has stood as the law of the state on the subject ever since.

The constitutional convention of 1889, by section 12 of article 7 of the constitution, provides that "The board of county commissioners for the several counties of the state shall constitute boards of equalization for their respective counties, whose duties shall be to equalize the valuation of the taxable property in the county, under such rules and regulations as shall be prescribed by law." By section 6 of article 18 of the same instrument they provided for a board of county commissioners. Since the adoption of the constitution but few amendments have been made to the Revised Statutes relative to the duties of a board of county commissioners as it existed under the territorial form of government. One of the principal amendments thereto has been sections 1759 and 1776 to 1779, inclusive. On the other hand, since the adoption of the constitution the legislatures have repeatedly passed revenue acts and in each act have provided for the equalization of assessments by the board of county commissioners. At no time, however, has the legislature ever provided for an appeal from any action or proceeding taken by the board of county commissioners when sitting as a "board of equalization." It is also worthy of observation that the board of county commissioners, as such, meet at stated periods for the transaction of the regular county business, but at none of these meetings are they authorized to equalize as-

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assessments or to sit as a board of equalization. On the other hand, it is provided by law that they shall meet at a specified time each year as a board of equalization and examine the assessment-roll and equalize the assessments of property within their respective counties. It seems to us that there are even more potent reasons now than when the General Custer Mining Company case was decided why an appeal will not lie from an order of the board of equalization. Since that decision was announced the constitution has been adopted, and by that instrument the "board of equalization" has become a constitutional board, recognized as such, with constitutional powers and duties prescribed; and the allowance of an appeal from an order of the board of county commissioners cannot reasonably be construed to extend to the allowance of an appeal from an order of the board of equalization. It is true that the board of county commissioners and the board of equalization are each composed of the same officials, but that fact can make no difference as to the distinct duties and functions of each board. While those officials are performing the duties and functions of the one board they are a distinct and separate organization from the other, and cannot discharge any of the duties of such other board at such time or in such meeting. The allowance of an appeal from the orders of one specified board does not extend to the orders of any other board. And the fact that the same individuals constitute the personnel of two or more distinct boards affords no reason for an exception to the rule. Under the law as it formerly existed in this state the probate judge was *ex-officio* superintendent of schools for his county. An appeal was allowed from the orders and judgments of the probate judge, and still no one ever seriously contended that this right of appeal extended to his orders and decisions when made as superintendent of schools.

The same question here considered was discussed extensively by the supreme court of Washington in *Olympia Water Works v. Board of Equalization*, 14 Wash. 268, 44 Pac. 267, and the court arrived at the conclusion that an act authorizing appeals from orders and proceedings of the board of commissioners does not authorize an appeal from an order of the board of equalization.

Points decided.

We are of the opinion that the judgment appealed from is void for want of jurisdiction in the district court entering the same. The cause will therefore be remanded, with direction to the district court to vacate and set aside the judgment and order so made and entered. Costs of this appeal awarded to appellant.

Sullivan, C. J., and Stockslager, J., concur.

(June 14, 1904.)

PERKINS v. BRIDGE.

[77 Pac. 329.]

UNDERTAKING ON APPEAL—SURETIES—JUSTIFICATION—FAILURE OF SURETIES TO JUSTIFY—NEW UNDERTAKING—FILING TRANSCRIPT—RULE OF COURT.

1. Under the provisions of section 4838, Revised Statutes, an appeal may be taken within thirty days after the rendition of a judgment by a probate judge or justice of the peace, and the appeal is taken by filing a notice of appeal with the justice or judge and serving a copy on the adverse party.

2. Under the provisions of section 4842, Revised Statutes, such appeal is ineffectual for any purpose unless an undertaking be filed with two or more sureties, and the adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they, or other sureties, justify within five days thereafter, upon notice to the adverse party to the amount stated in their affidavits, the appeal must be regarded as if no undertaking had been given.

3. In case such sureties fail to appear and justify, the undertaking signed by them is void, but the appellant may file a new undertaking at any time prior to the expiration of the thirty day period given in which to take the appeal, but notice of the filing of such undertaking ought to be given to the adverse party.

4. The rule of the district court requiring the transcript on appeal in all cases appealed from a justice's court to be filed in the district court within ten days after such appeal is perfected, and if not so filed the appeal may be dismissed on motion is not jurisdictional and should be applied with discretion.

(Syllabus by the court.)

Argument for Respondent.

APPEAL from District Court of Idaho County. Honorable Edgar C. Steele, Judge.

This is an action in forcible entry and detainer. Judgment of dismissal on motion of the plaintiff. Reversed.

Allen Miller and W. N. Scales, for Appellant.

"To effectuate an appeal," says Broderick, J., in delivering the opinion of the court in *Salt Lake Brewing Co. v. Gillman*, 2 Idaho, 195, 10 Pac. 32, "three things are required: The filing of the notice of appeal with the justice, service of a copy of the notice on the adverse party, and the filing of the undertaking. All three must be done within thirty days after the rendition of the judgment, and are jurisdictional prerequisites, but the order in which they are done is not material." The failure to justify destroys the bond for the purpose of the appeal. (*City of Tacoma v. Tacoma etc. Co.*, 28 Wash. 238, 68 Pac. 723; *Hosford v. Logus*, 13 Or. 130, 11 Pac. 900; *State v. Napton*, 24 Mont. 450, 62 Pac. 686; *Spurlock v. Port Townsend S. R. Co.*, 12 Wash. 34, 40 Pac. 420; *Davelin v. Post Falls etc. Co.*, 4 Idaho, 735, 44 Pac. 554; *Holcomb v. Reed*, 5 Idaho, 60, 46 Pac. 1019; *Numbers v. Rocky Mt. Tel. Co.*, 7 Idaho, 408, 63 Pac. 381.)

W. H. Casady and Fogg & Nugent, for Respondent.

That appellant contends that the failure of sureties to justify under section 4842, Revised Statutes of 1887, after exception taken, destroys the bond for the purposes of the appeal and not the appeal. We contend that it destroys the appeal and submit that our view is sustained both by the decisions and the principles upon which the decisions are based. So far as we are able to find there is but one decision directly on this point and this decision is under the California practice act, which is identical with our present statute. "It was necessary that the sureties should justify within five days after the notice of exception, and the failure to do so rendered the appeal a nullity." (*Roush v. Van Hagen*, 17 Cal. 121.) Under an identical statute, held that this requirement is mandatory. (*State v. Napton*, 24 Mont. 450, 62 Pac. 686; *Wood v. Superior Court*, 67 Cal. 115, 7 Pac. 200.)

Opinion of the Court—Sullivan, C. J.

SULLIVAN, C. J.—This is an action in forcible entry and detainer commenced in a justice's court of Idaho county. The judgment of that court was for the plaintiff and was entered on the tenth day of June, 1903. On June 22, 1903, the defendant filed and served his notice of appeal, and on the same day filed an undertaking on appeal. On June 25th plaintiff filed and served exception to sureties on said undertaking. On July 1, 1903, the defendant, who is appellant here, served notice that the sureties would appear and justify at 5 o'clock on that evening. The sureties failed to appear and justify. On July 2, 1903, appellant filed a new undertaking on appeal, and on July 3, 1903, he served notice on the respondent that he had filed a new undertaking on appeal in lieu of the original one. On August 3, 1903, the transcript in the case was filed in the district court. On the eleventh day of September, 1903, the plaintiff served his motion to dismiss the appeal on the ground, among others, that the sureties on the original undertaking had not appeared and justified according to notice, nor had any sureties justified thereon nor on any undertaking on said appeal. There is no dispute as to the facts. The motion to dismiss the appeal was sustained by the court.

It appears from the record that the motion to dismiss was made on two specific grounds, to wit: 1. The failure of the sureties to justify on exception to their sufficiency; 2. That the transcript on appeal to the district court was not filed within ten days after such appeal was perfected as provided by the rules of said court.

There is but one question presented by the record for determination and that is, whether the court erred in sustaining said motion to dismiss. Section 4838, Revised Statutes, provides that an appeal may be taken from a judgment in a civil action in a probate or justice's court at any time within thirty days after the rendition of the judgment, and that the appeal is taken by filing a notice of appeal with the justice or judge and serving a copy on the adverse party. Section 4842, Revised Statutes, provides, among other things, that an appeal from a probate or justice's court is not effectual for any purpose unless an undertaking be filed with two or more sureties, etc. Said

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last-cited section further provides that the adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or judge from whom the appeal is taken within five days thereafter upon notice to the adverse party, the appeal must be regarded as if no such undertaking had been given. It will be observed from the above-stated facts that on July 1, 1903, defendant served a notice that the sureties would appear and justify at 5 o'clock that evening. They failed to appear, and on the next day, July 2, 1903, defendant filed a new undertaking on appeal, and on the third day of July notified counsel for respondent of that fact.

Neither of said sections provides the time within which the undertaking on appeal must be filed after the service of the notice of the appeal. The judgment was rendered on the tenth day of June, 1903, and the second undertaking was filed on the second day of July following. Thus it appears that the second undertaking was filed within twenty-two days after the rendition of the judgment, eight days prior to the expiration of the thirty days allowed for taking the appeal. In taking an appeal from a judgment of the district court to the supreme court of the state, the statute provides that the appeal is ineffectual for any purpose unless within five days after the service of the notice of appeal an undertaking be filed. (Rev. Stats., sec. 4808.) But the time within which the undertaking must be filed after the notice of appeal has been served is not prescribed by statute in appeals from a justice's court, and if the undertaking is filed within the time in which an appeal may be taken, which is thirty days after the rendition of the judgment, it is filed in time.

The language used in the latter part of said section 4842, Revised Statutes, clearly indicates that the failure of the sureties to justify after their sufficiency has been excepted to destroys the bond for the purpose of the appeal and not the appeal. The statute provides that an appeal is taken by filing and serving notice thereof. As stated by counsel for appellant, "The appeal is a living entity, separate and apart from the bond." It lives thirty days after the rendition of judgment;

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at the end of that time it dies unless a proper undertaking has been filed. The words of the statute are: "The appeal must be regarded as if no such undertaking had been given"; that is, if the sureties excepted to, fail to justify. If no such undertaking had been given, then while there was life in the appeal, appellant had the right to file the proper undertaking. The first attempt to give a bond was a nullity—a void act. And we think it is clear under the provisions of our statute that a sufficient undertaking may be filed at any time before the thirty day period above referred to has expired. In case the sureties fail to appear and justify when required to do so, of course the undertaking that they have signed is void—is of no force or effect. As the statute gives the full thirty days in which to perfect an appeal if a second undertaking is filed within that time, and on proper notice to the opposing party, that is sufficient.

In *Starling v. Burdette*, 28 Wash. 261, 68 Pac. 723, the supreme court of Washington held that the bond in that case became void because the sureties failed to justify. The trial court granted the appellant the right to file a new bond, which he failed to do. In the case of *Spurlock v. Port Townsend S. R. Co.*, 12 Wash. 34, 40 Pac. 420, the sureties on the appeal bond failed to appear and justify and the appellant filed a new bond within the statutory time, and that was held a sufficient compliance with the statute. Where the sureties fail to appear and justify and a new bond is filed by the appellant, notice of the filing of such bond ought to be given to the opposing party.

As touching upon the question under consideration, see *Holcomb v. Reed*, 5 Idaho, 60, 46 Pac. 1019; *Numbers v. Rocky Mt. etc. Co.*, 7 Idaho, 408, 63 Pac. 381.

Counsel for appellant does not discuss the second ground of respondent's motion to dismiss, which was to the effect that the transcript was not signed in the district court within the time required by rule XV of said court, but states that the district judge dismissed the appeal solely and entirely on the ground that a new undertaking was not a sufficient compliance with the statute though filed within the time allowed by law for taking an appeal and notice of filing given. The record would indicate that the evil intended to be avoided by such rule never

Points decided.

arose in this case, as the transcript on appeal was filed August 3, 1903, and the district court did not convene until September 7, 1903; thus more than thirty days intervened between the filing of the transcript and the opening of the term of court at which said action was to have been tried. That rule of the court is not jurisdictional and should be applied with discretion. (*Stevenson v. Caldwell*, 14 Mont. 311, 36 Pac. 185.)

It does not appear that any prejudice resulted to the respondent because of the failure to file said transcript within the time required by said rule. The judgment of dismissal must be set aside, and it is so ordered, and the cause remanded for further proceedings in accordance with the views expressed in this opinion. Costs of this appeal are awarded to the appellant.

Stockslager, J., and Ailshie, J., concur.

(June 15, 1904.)

MOE v. HARGER.

[77 Pac. 645.]

APPEALS—WHEN WILL BE DISMISSED—JURISDICTIONAL QUESTION.

1. An appeal is not taken until the notice thereof is filed and served, both of which acts must be done within the statutory time.

2. The taking of an appeal is a jurisdictional question, and the court has no power to extend the time therefor, or to cure any defect therein.

3. On an appeal from the judgment, where the same has not been taken within sixty days after the rendition thereof, the appellate court cannot examine the evidence for the purpose of ascertaining whether or not it supports the decision or verdict.

(Syllabus by the court.)

APPEAL from District Court in and for Custer County. Honorable K. I. Perky, Judge.

From a judgment in favor of William Boone, respondent, and an order refusing a new trial, J. H. Baxter appeals. Appeal from order denying new trial dismissed and judgment affirmed.

Opinion of the Court—Ailshie, J.

Hawley, Puckett & Hawley, for Appellant Baxter, cite no authorities upon the points decided by the court.

N. H. Clark, for Respondent Boone, cites no authorities.

AILSHIE, J.—Counsel for respondent has moved for a dismissal of the appeal from the order denying the motion for a new trial on numerous grounds, the principal of which is the third: "That the appeal from the order overruling appellant's motion for a new trial was not filed within sixty days after said order was filed for record, said order having been filed September 29, 1903, and the notice of appeal filed December 4, 1903." The notice of appeal having been filed more than sixty days after the filing of the order refusing a new trial, this court has not acquired jurisdiction to consider such appeal.

Under subdivision 3 of section 4807, Revised Statutes, an appeal from an order granting or refusing a new trial must be taken "within sixty days after the order . . . is made on the minutes of the court or filed with the clerk."

This is a jurisdictional question and the court has no power to extend the time or cure the defect. On this question there is a unanimity of opinion among the courts. The notice of appeal appears to have been prepared at Boise by appellant's counsel on the sixtieth day and mailed on the same day to the clerk of the district court at Challis. The notice appears to have also been served on the same day. An appeal is not taken, however, until the notice is filed and served, both of which acts must be within the statutory time. (See Rev. Stats., sec. 4808.) From the affidavit of one of appellant's attorneys it seems that the tardiness in preparing and filing this notice of appeal was brought about by the failure and neglect of the clerk of the district court to answer letters written by the attorneys for information concerning the files and records of the case. We have no doubt but that if the clerk had answered the communications directed to him—as most persons would have done—we would not be under the necessity of dismissing the appeal. These delinquencies, however, are matters between the appellant and the clerk, and do not justify us in assuming jurisdiction of an appeal which has not been taken within the statutory time.

Argument for Appellant.

The appeal from the order refusing a new trial will be dismissed. This leaves the case here on appeal from the judgment.

Since the only complaint made on this appeal is the insufficiency of the evidence to support the findings and judgment, and the appeal from the judgment having been taken more than sixty days after the rendition thereof, we are not at liberty to consider that question. (Rev. Stats., sec. 4807.) The judgment is affirmed, with costs to respondent.

Stockslager, J., concurs.

Sullivan, C. J., did not sit at the hearing and took no part in the decision.

(June 16, 1904.)

VOLLMER v. ESTATE OF JAMES W. REID.

[77 Pac. 325.]

CHATTEL MORTGAGE—RENEWAL.

1. Where it is shown that a chattel mortgage is given as security for a debt then existing, evidenced by a promissory note of even date therewith, and thereafter a new note and chattel mortgage are given to cover the same debt, even though a different rate of interest is provided for in the new note, and an additional sum for attorney's fee provided for therein, *held*, not to be a new contract where it is stated in the mortgage that the new obligation is given for the purpose of renewal of the old.

(Syllabus by the court.)

APPEAL from the District Court of Nez Perce County.
Honorable Edgar C. Steele, Judge.

From a judgment for plaintiff, defendant Morris appeals.
Affirmed. Costs awarded to respondent.

The facts are stated in the opinion.

Daniel Needham, for Appellant.

We contend that after the legislature of this state enacted the law requiring the joint concurrence of both husband and

Argument for Respondent.

wife in order to create a valid chattel mortgage on exempt personal property, the said mortgagor could not create any valid liens on the property in controversy, nor renew or extend any lien that was placed thereon prior to the enactment of said law—Session Laws of the state of Idaho of 1899, page 292—to the prejudice of the interest of subsequent intervening third parties without the concurrence of his wife. In support of the foregoing contention we cite the following: *Kindall v. Lincoln Hdw. etc. Co. et al.*, 8 Idaho, 664, 70 Pac. 1056; *Willows v. Rosenstein*, 5 Idaho, 305, 48 Pac. 1067; *Watt v. Wright*, 66 Cal. 202, 5 Pac. 91; *Wood v. Goodfellow*, 43 Cal. 185. When third persons have subsequently acquired interests in the mortgaged property, they may invoke the aid of the statutes as against the first mortgagee, even though the mortgagor, as between himself and the mortgagee, may have waived its protection; and we see no difference in principle between a suspension of the running of the statutes resulting from an express waiver and one caused by the voluntary act of the mortgagor in the absenting himself from the state. (*California Bank et al. v. Brooks*, 126 Cal. 198, 59 Pac. 302; *Newhall v. Hatch et al.* (Cal.), 64 Pac. 250.) We further contend that an acknowledgment in writing must clearly relate to the particular debt, must identify it, and must amount to a promise to pay it, or it will be insufficient. (*Gragg v. Barnes*, 32 Kan. 301, 4 Pac. 276; *Haythorn v. Cooper*, 65 Kan. 338, 69 Pac. 333; *Shepherd v. Thompson*, 122 U. S. 231, 7 Sup. Ct. Rep. 1229, 30 L. ed. 1156.) Can it be said that the note of June 28, 1900, on its face clearly relates to the note of March 21, 1896, as the particular debt, or identify it in any way? We think not; and it is apparent to us that the transaction of 1900 must stand as a new contract, which under the laws of this state is void. (*Siemens & Halske Electric Co. of America v. Ten Broek*, 97 Mo. App. 173, 70 S. W. 1092.)

George W. Tannahill, for Respondent.

Counsel contends that the court erred in entering its finding No. 5, for the reason that there was no reference made in the note dated June 28, 1900, to the note dated March 21, 1896, and that the court erred in admitting oral evidence in explana-

Opinion of the Court—Stockslager, J.

tion of the execution of the note bearing date June 28, 1900, connecting the same with the note bearing date March 21, 1896, and proving by oral evidence that the note dated June 21, 1900, was a renewal of the note dated March 21, 1896. This court has passed upon this question and held that the identity of the two notes may be shown by parol testimony. (*Kelly et al. v. Leachman*, 3 Idaho, 629, 33 Pac. 44; *Kincaid v. Archibald*, 73 N. Y. 189; *Fowler v. Elwood*, 66 Ill. 446; *Wilcox et al. v. Williams*, 5 Nev. 206; *Birrell v. Schie et al.*, 9 Cal. 104-108; *Spring v. Hill & Carr*, 6 Cal. 18; Herman on Chattel Mortgages, 129.) Section 3351, Revised Statutes of Idaho, provides how a mortgage may be renewed or extended. We contend the acknowledgment of the chattel mortgage dated June 28, 1900, meets the requirements of this statute, and if it did not, this court has frequently held that the extension of time simply affects the remedy and not the obligation. We call special attention to the cases heretofore decided by the court, to wit: *Moulton v. Williams*, 6 Idaho, 424, 55 Pac. 1019; *Law v. Spence*, 5 Idaho, 244, 48 Pac. 282-284; *Burk Land etc. Co. v. Wells-Fargo Co.*, 7 Idaho, 42, 60 Pac. 92.

STOCKSLAGER, J.—The plaintiff commenced his action in the district court of Nez Perce county, alleging that on the twenty-first day of March, 1896, Jas. W. Reid executed and delivered to John P. Vollmer his promissory note for \$331, due in ninety days after date, with interest at the rate of one and one-half per cent per annum from date, which note provided for payment in event of suit or action to enforce the execution of the same, the sum of \$30 attorneys' fees.

The fourth allegation is that to secure the payment of said note Reid mortgaged to Vollmer on the same date the following chattels: Federal Reporter, volumes 1 to 68, and four digests; Pacific Reporter, volumes 1 to 42, and one digest; American Annual Digest, 10 volumes, 1887 to 1895, inclusive; New York Reports, Court of Appeals, volumes 1 to 147, and four digests by Brightly.

That plaintiff annexes hereto as a part hereof a copy of said mortgage and hereby incorporates the same herein the same as if set forth at length.

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The sixth allegation says: "That subsequent to the execution and delivery of said promissory note and of said mortgage, on, to wit, the twenty-eighth day of June, 1900, the said Jas. W. Reid renewed the said note and mortgage and on the said twenty-eighth day of June, 1900, the said Jas. W. Reid, for the purpose of renewing the said note and mortgage as aforesaid, executed and delivered to John J. Vollmer his promissory note for \$334 of date January 27, 1899, due one year after date at the rate of twelve per cent per annum from date, which note provided for the payment of \$50 attorneys' fees in event of suits, etc."

The seventh allegation is: "That for the further purpose of renewing said promissory note and mortgage as above described, the said Jas. W. Reid, as mortgagor, on the twenty-eighth day of June, 1900, executed and delivered to John P. Vollmer, as mortgagee, his certain instrument in writing, under seal, known as a chattel mortgage, a copy of which is hereto annexed, marked exhibit 'A' and made a part of this complaint as fully as if here set out, which said chattel mortgage was made in good faith for the purpose aforesaid, without intent to defraud creditors and purchasers, and was verified, acknowledged and filed pursuant to statutes in such case made and provided, and was duly filed for record on the thirtieth day of June, 1900."

The eighth allegation is "that the property mentioned and described in said chattel mortgage and the schedule annexed consisted of the following law books constituting a part of his library, to wit:" (Here follows a description of the same books described in the mortgage of March 21, 1896, and an allegation that this mortgage was a renewal of said first mortgage.)

The ninth allegation is that the last described note and mortgage were made, executed and delivered for the purpose of renewing the said note and mortgage, dated March 21, 1896, together with the accrued interest thereon, which said promissory note last above described is the identical note first above described, with the interest included therein, and is a renewal thereof.

The tenth allegation is that default has been made in the said chattel mortgage and the said notes in this: that the said notes have long since matured and remain wholly and entirely unpaid.

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The eleventh allegation is that prior to the institution of this proceeding, plaintiff presented to the administrator of the estate of Jas. W. Reid his claim based upon said note, and at the time of presenting the same based his claim upon a copy of the note and mortgage referred to, and that the same was duly allowed as a secured claim against said estate by the administrator thereof, which allowance was approved by the probate court of Nez Perce county.

The twelfth sets out that there is due on said note as renewed and secured by said mortgage the sum of \$504, with interest on \$344 thereof at twelve per cent per annum from February 10, 1903.

The thirteenth alleges that the Lewiston National Bank, a corporation, and J. B. Morris, have, or claim to have, some interest in the property herein described and described in the hereto annexed exhibit as mortgagees, encumbrancers or purchasers, the exact nature of which is unknown to plaintiff, and which interest is subsequent, subject, prior and junior to plaintiff's said mortgage, and said corporation and said Morris are made parties hereto by reason of such adverse interest.

The prayer is: 1. That plaintiff's mortgage dated March 21, 1896, and promissory note of the same date for the sum of \$331 be revived, and that said promissory note and chattel mortgage as renewed and revived be foreclosed.

2. That the defendant and the estate of Jas. W. Reid, deceased, be foreclosed of all equity of redemption; that the mortgaged property be sold and the proceeds applied to the payment of the costs and expenses in this action and of counsel fees in the sum of \$50, and the amount due on said note and mortgage with interest from February 10, 1903, at twelve per cent per annum; that the estate of Jas. W. Reid, deceased, be adjudged to pay any deficiency that may remain after applying all of said money as aforesaid and for costs of suit.

The answer admits the corporate existence of the First National Bank of Lewiston as alleged in the complaint, also that Jas. W. Reid died intestate, as alleged, and that Jas. R. Lydon was appointed administrator of his estate and as such admits his possession of the property in controversy. That the schedule

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of law books set forth in the complaint constitute a part of the law library of said Reid; that prior to the commencement of this action plaintiff presented his claim based upon said note, and that the same was duly allowed as a secured claim against the said estate by the administrator, which allowance was approved by the probate court of Nez Perce county. That J. B. Morris claims to have an interest in the property in controversy, and avers that said Morris is a preferred creditor of said estate to the amount of \$559.

For a second and separate affirmative defense the defendants aver that the right of plaintiff to maintain an action on the note and mortgage alleged to have been executed by said Reid March 21, 1896, was barred by the provisions of section 4052, Revised Statutes of Idaho, before the commencement of this suit.

As a third and separate affirmative defense defendants aver that the property covered by the pretended mortgage dated June 28, 1900, is exempt from execution under the laws of this state, for the reason that Reid was a married man at the time of the execution of said pretended mortgage and that his wife did not sign said pretended mortgage, hence it is void as to subsequent creditors.

Upon the issues thus framed the case was tried and the court made its findings of fact and conclusions of law.

The findings on the disputed issues are as follows: That on the twenty-first day of March, 1896, Jas. W. Reid executed and delivered to John P. Vollmer his promissory note for \$331. That to secure the payment of said note said Jas. W. Reid made and executed the mortgage dated March 21, 1896, mortgaging the property described in said mortgage; then follows a description of the property as appears in the complaint. That subsequently, to wit, the twenty-eighth day of June, 1900, said Reid renewed said note and mortgage, and for the purpose of renewing said note and mortgage said Reid on same day executed and delivered to said Vollmer his promissory note for \$344 and his certain acknowledged indenture renewing said mortgage, thereby renewing the said note and continuing in full force and effect said mortgage bearing date March 21, 1896.

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That default has been made in the payment of said chattel mortgage and said note, and that said notes have long since matured and remained wholly and entirely unpaid. That there is now due, owing and unpaid on the said promissory note dated June 28, 1900, in principal and interest, the sum of \$481.38. That all the material allegations of plaintiff's complaint are found to be supported by the evidence and true. That all the material allegations and averments of defendant's answer in conflict with the foregoing findings are found to be unsupported by the evidence and not true. That said note dated June 28, 1900, and the note dated March 21, 1896, and said mortgage dated March 21, 1896, are found to be not barred by the statutes of limitations as alleged in defendant's answer. That the allegations contained in defendant's second and third affirmative defense are found to be unsupported by the evidence and not true.

The conclusions of law follow the foregoing findings of fact.

Counsel for appellant in his brief says the points to be determined are as follows: 1. Is the note of June 28, 1900, a renewal of the chattel mortgage of March 21, 1896? 2. Is the chattel mortgage of June 28th executed in accordance with the laws of the state of Idaho? 3. Was the right of action based on the note and chattel mortgage executed on the twenty-first day of March, 1896, at the time of the commencement of this action under the laws of this state? 4. Can lien of the note and mortgage be extended by the contract of the parties to the prejudice of the intervening rights of third persons without their concurrence?

There does not seem to be any question but that the deceased, Reid, executed and delivered the note and chattel mortgage dated March 23, 1896; neither is the execution and delivery of the note and chattel mortgage of date June 28, 1900, by deceased, Reid, to John P. Vollmer questioned, as shown by the record. The good faith and honesty of purpose of neither deceased or Vollmer is called in question in either transaction. It is also beyond question that deceased at the time of the execution and delivery of the notes and mortgages in both transactions, and for a number of years prior thereto, had

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resided in the city of Lewiston, this state, and his wife during all this time had resided in the state of North Carolina, never at any time claiming her residence in Idaho. It is further shown by the record that she is not in court claiming any relief under the exemption laws of this state.

The contention of counsel for appellant is based upon the theory that the note and mortgage of June 28, 1900, is not in any sense a renewal of the note and mortgage of date March 21, 1896, hence a new contract, and subject to the terms and conditions of the statute then in force relative to chattel mortgages. The statute referred to is found in Session Laws of 1899, page 292, and is as follows: "No personal property of either husband or wife that is exempt by law from execution shall be mortgaged by either husband or wife without a joint concurrence of both." And in support of this position we are cited to *Kindall v. Lincoln Hdw. etc. Co.*, 8 Idaho, 664, 70 Pac. 1056. This was an action to foreclose a chattel mortgage on a certain growing crop on the land of defendant Kindall and his wife, who were residing together in the state of Idaho, the action being a joint one of husband and wife to enjoin the sale of the crop under the exemption laws of the state. This case is not decisive of the one at bar for the reason that the real parties in interest invoked the exemption laws of the state, and for the further reason that there is no question of renewal of the note and mortgage, the entire transaction being under the laws as they now exist relative to exemption of chattel property.

Our attention is also called to *Willows v. Rosenstein*, 5 Idaho, 305, 48 Pac. 1067. The syllabus says: "The plaintiff gave to defendant a chattel mortgage to secure an indebtedness of some \$341; subsequently plaintiff and his copartner becoming indebted to defendant, they jointly executed to the defendant a chattel mortgage upon property belonging to the firm for the sum of \$1215, in which was included the amount of said first mortgage of \$341. The mortgage for \$1215 was subsequently paid in full. By an agreement between plaintiff and defendant the latter was, however, to hold said first mortgage as security for an individual indebtedness existing and to arise

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from future advances to be made by defendant to plaintiff. Such agreement is contrary to the provisions of section 3551, Revised Statutes of Idaho."

The contention of learned counsel for appellant is not supported by this case. In the opinion which was written by Mr. Justice Huston and concurred in by his associates, Justices Sullivan and Quarles, we find the following language: "The taking of new or additional security for the same debt does not always operate as a release or cancellation of the original security; a new mortgage and note are payment of the old security when such is the agreement or understanding of the parties; citing Jones on Mortgages, sec. 645; *Brown v. Dunckel*, 46 Mich. 29, 8 N. W. 537; 2 Jones on Mortgages, sec. 926."

If we are to follow this case—and we can see no reason why we should not—it is decisive of the question before us for consideration. In the mortgage of June 28, 1900, following the description of the property, we find the following language: "And the same books heretofore mortgaged by said first party to John P. Vollmer on the twenty-first day of March, 1896, *this mortgage being a renewal of said mortgage given on the twenty-first day of March, 1896.*" Can there be any misapprehension of the intention of the parties to this transaction?

It is next urged by counsel for appellant that owing to the fact that the second mortgage covered all the books of the first and seven additional volumes, and that the consideration was \$331 in the first note and \$344 in the second, and also that the rate of interest was different as stipulated in the notes, and the amount provided for as attorneys' fees in case of foreclosure was not the same in the two notes, that the second note and mortgage became a new contract and in no sense a renewal of the old.

Under the facts in this case we cannot give our assent to this contention. The entire record shows honest dealing and the best of faith on the part of Mr. Vollmer and the deceased, Reid, to keep the original security alive. When the new note and mortgage were given, the legal rate of interest as then provided for by law was incorporated into the notes, the difference between \$331, the original note, and \$344, the new

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one, was doubtless the interest due on the old note as agreed upon. The \$20 additional attorney's fee provided for in the new note was evidently agreed upon. (See *Kelley et al. v. Leachman*, 3 Idaho, 629, 33 Pac. 44.) It might be well to suggest that the deceased, Reid, was a lawyer of known ability all over the state, hence it cannot be said that he did not fully understand the transaction and did not intend to do just what he stated in the mortgage to renew the original debt.

Other errors are assigned, but in our view of the case it is unnecessary to pass upon them.

The judgment is affirmed with costs to respondent.

Sullivan, C. J., concurs in conclusion reached.

AILSHIE, J., Concurring.—I desire to place my concurrence entirely upon the proposition that the transaction of June 28, 1900, was a renewal of the contract and obligation of March 21, 1896. This renewal kept the original contract alive and in force and entitled the plaintiff to the relief granted.

(June 17, 1904.)

VILLAGE OF ST. ANTHONY v. BRANDON.

[77 Pac. 322.]

CITY OR VILLAGE ORDINANCE—TITLE—SUFFICIENCY OF.

1. The title to an ordinance of a city or village in this state, to wit, "An ordinance regulating and licensing liquor dealers within the village of St. Anthony," is sufficient where the ordinance provides for the payment of a fixed sum for retail liquor dealers only, and prohibits the business of running a restaurant or lunch counter in connection therewith or in the same room, and also requires the doors to be closed on Sunday, and also prohibits music, singing and dancing in the room occupied as a saloon.

(Syllabus by the court.)

APPEAL from District Court, Fremont County. James M. Stevens, Judge.

Judgment for respondent, from which defendant appeals. Affirmed.

Argument for Appellants.

The facts are stated in the opinion.

Hawley, Puckett & Hawley and King & Millsaps, for Appellants.

Had the plaintiff, said board of trustees, power or right to enact that portion of said ordinance making it unlawful to carry on, or allow to be carried on, any other business in the same room wherein intoxicating liquors are sold? We are aware that, under the provisions of section 1916 of the Political Code of Idaho, and especially subdivision 15 thereof, the village trustees have the right to license, regulate and prohibit the selling or giving away of any intoxicating malt, vinous, mixed or fermented liquors. But this provision of the ordinance in question is not for the purpose, nor does it regulate the sale of liquors, but it is purely and simply an attempt to regulate a legitimate business, and, we might say, to even go further, and prohibit the carrying on of any legitimate business in the same room where intoxicating liquors are sold, and is certainly against public policy, as being in restraint of trade. If the village trustees can prohibit the carrying on of any other business in the same room wherein intoxicating liquors are sold, they could certainly extend it to the same block, the same street, or, why not, even go so far as to say that no other business could be carried on in the same town where intoxicating liquors are sold. (U. S. Const., 14th Amendment.) The ordinance in question is clearly class legislation under the decisions and definitions given by the authors, as it does not affect all alike belonging to the same class; in other words, it only affects those dealers who sell liquor to be drank in, on or about the premises where sold, or, as a matter of fact, retail liquor dealers. The ordinance does not pretend to license or regulate the sale of liquors not to be drank in, on or about the premises where sold, or by druggists. The whole proposition in a nutshell is simply this: It attempts to regulate the sale of liquors at retail, but not the sale of liquors at wholesale, or by druggists, which, we contend, is clearly class legislation, as all ordinances must be impartial, fair and general. (*Ex parte Frank*, 52 Cal. 606, 28 Am. Rep. 642; *Dillon's Municipal Corporations*, sec. 256; *City of Cario v. Feuchter et al.*,

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159 Ill. 115, 42 N. E. 308; *City of Monmouth v. Popel et al.*, 183 Ill. 634, 56 N. E. 348.)

Caleb Jones, for Respondent.

It is suggested that the subject of the ordinance is not clearly expressed in the title of the ordinance, the title being as follows: "An ordinance regulating and licensing liquor dealers within the village of St. Anthony." (*State v. Beattie*, 16 Mo. App. 131; *In re Wilson*, 32 Minn. 145, 19 N. W. 723; Smith's Modern Law of Municipal Corporations, sec. 517; Horr & Bemis on Municipal Police Ordinances, sec. 71; *State v. Cantieny*, 34 Minn. 1, 24 N. W. 461; *State v. Gut*, 13 Minn. (Gil. 315) 341; *State v. Cassidy*, 22 Minn. 312, 21 Am. Rep. 765; *Board of Supervisors of Ramsey Co. v. Heenan*, 2 Minn. (Gil. 281) 330; *Tuttle v. Stout*, 7 Minn. (Gil. 374), 465, 82 Am. Dec. 108; *City of St. Paul v. Colter*, 13 Minn. (Gil. 16) 49, 90 Am. Dec. 278.) Examples of reasonable ordinances with similar provisions to that of the ordinance in question can be found in Horr & Bemis on Municipal Police Ordinances, sec. 130; *State v. Preston*, 48 Vt. 12; *Ritchie v. Zalesky*, 98 Iowa, 589, 67 N. W. 399; *Brown v. Lutz*, 36 Neb. 527, 54 N. W. 860. Had the plaintiff's said board of trustees power or right to enact that portion of said ordinance making it unlawful for persons engaged in the sale of intoxicating liquors to permit the door or doors of their place of business to be opened on Sunday? I contend that this regulation is in the interest of decency and morality, and the power to make such a regulation concerning the acts of liquor dealers is given to the village trustees in their plenary power to completely prohibit. It is a usual regulation, probably the most common of all regulations in connection with the liquor business, as the following decisions will show: *Kurtz v. People*, 33 Mich. 279; *McNiel v. State*, 92 Tenn. 719, 23 S. W. 52; *State v. Harris*, 50 Minn. 128, 52 N. W. 387, 531; *Theisen v. McDavid*, 34 Fla. 440, 18 South. 321, 26 L. R. A. 234; *Ex parte Abram*, 34 Tex. Cr. App. 10, 28 S. W. 818.

STOCKSLAGER, J.—This case was submitted to the lower court on an agreed statement of facts, to wit:

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1. That the plaintiff, the village of St. Anthony, is a municipal corporation duly and regularly organized and existing under and by virtue of the laws of the state of Idaho, and is a village, and situated in Fremont county, in the state of Idaho; that M. E. Jamison, B. C. Bowers, W. C. Yager, W. W. Yoe-mans and J. L. Pratt are the duly qualified and acting board of trustees of the village of St. Anthony; that M. E. Jamison, is the duly qualified and acting chairman of the board of trustees, and that Charles C. Bowerman is the duly qualified and acting clerk of the said board.

2. That the defendants, Thomas J. Brandon, Jr., and J. C. Brandon, are partners and doing business under the firm name and style of Brandon Brothers in said village of St. Anthony, in Fremont county, state of Idaho, as proprietors and keepers of a saloon, wherein they sell and dispose of spirituous, malt and fermented liquors and wines to be drank on the premises where sold, and cigars, and that they have been, and are now, engaged in said business at said place.

3. That on the fourteenth day of July, 1903, at a regular meeting of the board of village trustees of said village of St. Anthony, an ordinance No. 90 was regularly presented to said board of village trustees, for their action thereon, which said ordinance and the title thereof is in substance following:

**“An Ordinance Regulating and Licensing Liquor Dealers With-
in the Village of St. Anthony.”**

Section 1 prohibits the sale of liquors of any kind to be drank in, on, or about the premises where sold, without first procuring a license and giving a bond as hereinafter provided.

Section 2 requires all applications to sell liquors to be drank in, on, or about the premises to be made to the board of trustees in writing, setting forth the names of the parties and a description of the place wherein it is proposed to commence and conduct said business.

Section 3 provides that before any license is issued the applicant shall produce before the board of trustees the receipt of the village treasurer showing payment of the amount due for such license, and execute and deliver to said board a bond

to the state of Idaho, in the penal sum of \$1,000, with at least two good sureties.

Section 4 provides that each application shall pay the sum of \$75 per quarter for such license, and no license under the provision of the ordinance shall be issued for a longer period than three months.

Section 5 provides for a revocation of a license in case of a violation of any of the provisions of the ordinances of the village or of the penal statute of the state, and makes it the duty of the board of trustees to revoke such license in case of any such violation.

Section 6 permits druggists to sell wines and liquors for sacramental, mechanical, medicinal and scientific purposes without a license.

Section 7 provides that on the presentation of an application to the board of village trustees, they shall on the approval of the bond direct the clerk to issue such license.

Section 8 provides that the license shall specify by name the person, firm or corporation to whom it shall issue, and shall designate the particular place at which the business shall be carried on.

Section 9 provides that any person licensed as aforesaid, or any person refusing or neglecting to obtain a license as herein provided, who shall sell, give away or otherwise dispose of any intoxicating drink at any time during the first day of the week, commonly called Sunday, except he be a druggist, and then only for medicinal purposes upon the prescription of a regularly licensed physician, shall be deemed guilty of a misdemeanor.

Section 10 prohibits any idiotic person or any minor under the age of twenty-one years, or any female, to enter, be or remain in said place.

Section 11 prohibits any other business to be carried on in the same place or room, or to permit the door or doors to be opened on Sunday or allow the door or doors to be used as a means of egress or ingress or entrance or exit to any other room where any other different class of business is carried on.

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Section 12 prohibits any dancing, music, singing or loud or boisterous talking or any disorderly conduct on the premises where intoxicating liquors are sold.

Section 13 provides punishment for violation of any of the provisions of the ordinance.

It is stipulated that the ordinance was regularly passed and approved by the chairman of the board of trustees and thereafter published; that appellants have no license for carrying on the business as retail liquor dealers from the village of St. Anthony, and have not paid the sum required by the ordinance to said village or any officer thereof, neither have they applied for a license or executed the bond provided for by the ordinance. That appellants have for three months last past permitted one William Weller to carry on, under and by virtue of a lease and rental made with the said Weller expiring on June 30, 1904, the business of keeping a restaurant and lunch stand in the same room wherein they carry on their said business.

The questions submitted are:

1. Is the ordinance in question, or any portion thereof, a valid and existing ordinance of said village of St. Anthony? Have the defendants any right to carry on their said business without first procuring a license from the said village?
2. Is that portion of said ordinance requiring retail liquor dealers to give a bond and procure a license before carrying on or engaging in said business within the power of the board of trustees of plaintiff to enact?
3. Had the plaintiff's said board of trustees power or right to enact that portion of said ordinance making it unlawful to carry on, or allow to be carried on, any other business in the same room wherein intoxicating liquors are sold?
4. Had the plaintiff's said board of trustees power or right to enact that portion of said ordinance making it unlawful for persons engaged in the sale of intoxicating liquors to permit the door or doors of their place of business to be opened on Sunday?
5. Had the said board of trustees any power or right to pass that portion of said ordinance making it unlawful for a person engaged in the sale of intoxicating liquors to permit singing, music or dancing in his or their place of business?

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Findings of fact and conclusions of law were waived and the judgment of the trial court sustained each and every provision of the ordinance save and except that part requiring retail liquor dealers to give a bond to procure a license. This part is held invalid but without affecting the remainder of said ordinance.

The first contention of counsel for appellant is that the subject of the ordinance is not clearly expressed in its title as required by section 1910, Political Code; Session Laws 1893, page 122, section 79; Session Laws of 1899, page 209, section 83. The particular part of this section to which our attention is called is as follows: "An ordinance shall contain no subject which shall not be clearly expressed in its title." Much depends upon the construction to be given to the language above quoted, construed in connection with the title to the ordinance under consideration.

It is earnestly insisted by learned counsel for appellant that by examining the ordinance it is shown that it regulates the sale of spirituous, malt or fermented liquors or wines, etc., but according to the title it only pretends to regulate and license the dealer, and not the sale, as it does in the body of the ordinance. And, again, the title simply refers to liquor, while in the first section of the ordinance it specifies spirituous malt or fermented liquor or wines; in other words, intoxicating liquors. It is not contended by counsel for appellant that the village of St. Anthony by proper ordinance or ordinances may not do all that is claimed for this ordinance, except that part requiring a bond before a license can issue. It is conceded by counsel for respondent that the holding of the court on this issue submitted is correct, and hence we are not called upon to pass on this question.

As we read the record and briefs in this case, a disposition of the question of the sufficiency of the title to the ordinance disposes of all the questions submitted to the lower court and here for review on this appeal. Section 256 of Dillon on Municipal Corporations is cited by counsel for appellant to support the contention that the ordinance attempts to regulate the sale of liquors at retail, but not the sale of liquors at wholesale, or by druggists, which it is urged is class legislation. Mr. Dillon says: "As it would be unreasonable and unjust to make, under

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the same circumstances, an act done by one person penal, and if done by another not so, ordinances which have this effect cannot be sustained. *Special* or unwarranted discrimination, or unjust or oppressive interference in particular cases, is not to be allowed. The powers vested in municipal corporations should, as far as practicable, be exercised by ordinances general in their nature and impartial in their operation." The soundness of this principle cannot be questioned, but attention must be given to the language of the author, to wit, "under the same circumstances." Can it be said that the same conditions or the same circumstances exist where the druggist sells on prescriptions or for certain prescribed purposes, or the wholesale dealer, who only sells in large quantities, as where the retail dealer keeps his place of business open especially for the retail of his liquors? Common observation teaches that a very different state of facts exist. *City of Cairo v. Feuchter et al.*, 159 Ill. 115, 42 N. E. 308, is also cited in support of the same contention of appellants. In this case the ordinance provided that any wholesale liquor dealer might be granted a license upon payment of \$100 to the city treasurer. Another section of the same ordinance provided that the ordinance shall not apply to persons who shall have a valid license for the sale of liquors in less quantities than one gallon. It would seem that the city attempted by this ordinance to grant a retail dealer a license to do a wholesale business without requiring him to pay a wholesale dealer's license, thus discriminating against the wholesale dealer.

The ordinance under consideration does not go to this length; there is no discrimination between parties engaged in the same kind of business. The entire ordinance is leveled at the business of retail liquor dealers; whether the village has an ordinance regulating wholesale dealers we are not informed, nor is it material for the determination of this question. Section 6 of the ordinance permits druggists without a license to sell wines or liquors for sacramental, mechanical, medicinal and scientific purposes. This is in no sense a license to either wholesale or retail intoxicating liquors. If the title of this ordinance is sufficient, there is no question of the power of the trustees of the village of St. Anthony to require all saloons or places where

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liquors are sold to be drank on the premises—retail dealers—to remain closed on Sunday; they may also prohibit a restaurant or lunch counter from being conducted in the same room where intoxicating liquors are sold; likewise they may prohibit music, singing and dancing in such places. Under the police power of the state they may regulate the business to be conducted in the village, and as said in *State v. Cantieny*, 34 Minn. 1, 24 N. W. 458: "The one purpose and whole scope of the ordinance is to prohibit certain acts derogatory to peace, good order and morals, and to enforce the enactment of proper penalties."

We think the same can be said of the ordinance under consideration, the sole purpose being to so control the retail liquor trade of the village as to best preserve the quiet and peace of the citizens. If a restaurant or lunch counter were permitted to be conducted in the room where intoxicating liquors are sold, it would be an excuse for parties to frequent such places on Sunday, and in this way the officers of the village would be hampered in the enforcement of the ordinance providing for closing all such places on Sunday. Music, singing or dancing in such places is not calculated to bring about peace and quiet for the citizens of the village who may reside in the vicinity of such places, and we can see no reason why the village authorities may not control such places in the interest of good morals and the peace and quiet of the people.

The words "regulating" and "licensing liquor dealers" as used in the title of the ordinance seem to be the objectionable ones used therein. The Century Dictionary defining the word "regulating," says: "It means to put or keep in order; as to regulate the disordered state of a nation or its finances."

In speaking of the word "license," it defines the word: "Power to license conferred on a municipality is generally understood to mean power to regulate by prescribing the conditions or compliance with which the thing shall be permitted."

It is urged that this ordinance attempts to regulate other classes of business. We do not so construe its language. There is no attempt to regulate any business except that of retail liquor dealers. To say that a restaurant or lunch counter cannot be conducted in the same room where intoxicating liquors are sold,

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to be drank on the premises, or that music or dancing shall not be permitted in such places, is not an attempt to control such business. Either may be conducted elsewhere, and there is no prohibition in the ordinance, only it must not be where liquors are sold to be drank on the premises, or, in other words, a saloon. We think the title to the ordinance is sufficient to warn anyone who may want to know what is contained in the ordinance. The purpose is to require all retail liquor dealers to pay a license fee to the village and keep an orderly house, keep it closed on Sunday and not permit music, singing or dancing to be carried on therein. We think the judgment of the trial court should be affirmed, and it is so ordered, with costs to respondent.

Sullivan, C. J., and Ailshie, J., concur.

(June 21, 1904.)

LEWIS v. UTAH CONSTRUCTION COMPANY.

[77 Pac. 336.]

CONTRACT—RAILROAD CONSTRUCTION—COMPLAINT—DEMURRER—ESTIMATES—CLASSIFICATION—EVIDENCE—VARIANCE BETWEEN ALLEGATIONS AND PROOF—INSTRUCTIONS.

1. Complaint states a cause of action.
2. The question of whether the estimates had become an account stated was left to the jury under proper instructions.
3. Where a motion is made to compel the plaintiffs to elect upon which of several causes of action or counts they would proceed to trial, it was not error for the court to reserve its decision and thereafter try the case upon the theory that said motion had been sustained and try the case upon the first and third causes of action stated in the complaint.
4. Where the parties to an action testify to an express contract but differ as to the amount to be paid or the contract price for the services rendered, evidence of the actual cost of the performance of the work is properly admitted as it may afford some reasonable ground for believing that the contract was for the price nearest the cost.
5. No variance between the allegations and the proof is deemed to be material unless it had actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits.

Argument for Appellant.

6. Where certain material evidence is rejected, but the record shows that the evidence rejected was given by another witness, the error is immaterial and not prejudicial.

7. Instructions examined and held to properly state the law applicable to the evidence introduced on the trial.

(Syllabus by the court.)

APPEAL from the District Court of Bannock County.
Honorable Alfred Budge, Judge.

Action to recover balance due on railroad construction contract. Judgment for the plaintiffs. Affirmed.

The facts are stated in the opinion.

F. S. Dietrich and Henderson & Macmillan, for Appellant.

All material facts essential to the establishment of plaintiffs' right should be pleaded, and if they are not pleaded a general demurrer will be sustained. (*Bingham County v. Woodin et al.*, 6 Idaho, 284, 55 Pac. 662.) According to the allegations of the complaint plaintiffs rely upon the estimates made and furnished them by the defendant. These are the estimates that plaintiffs are seeking to vary and repudiate in an action brought almost two years after they were furnished without an allegation of repudiation or of mistake or of fraud. Those monthly statements, together with the final estimate, became an account stated between the plaintiffs and defendant and cannot be repudiated unless through error, mistake or fraud. (*Hendy v. March*, 75 Cal. 566, 17 Pac. 702; *Cross v. Sacramento Sav. Bank*, 66 Cal. 462, 6 Pac. 94; *Manchester Paper Co. v. Moore*, 104 N. Y. 680, 10 N. E. 861; 1 Cyc. of Law & Pr., p. 454, note 88.) The only issue framed by the pleadings in this case was, What were the terms of the contract? This being the issue, we claim that no evidence offered under the second cause of action, "What was the reasonable value of the work done?" would be material to prove the terms of the contract. (Bliss on Code Pleading, 2d ed., par. 119; 5 Ency. of Pl. & Pr., pp. 326-330.) The questions, "What per cent of the work performed by plaintiffs under their contract was similar in character to the work done upon the south end of the Dell sidetrack?" This question or questions of a similar import were asked of plaintiffs' wit-

Argument for Appellant.

nesses and were objected to on the part of the defendant, for the reason that said questions were immaterial and were not embraced in any issue presented by plaintiffs' complaint. It constituted a variance from the allegations of the complaint. (22 Ency. of Pl. & Pr. 527; *Ohlencamp v. Union Pac. R. R. Co.*, 24 Utah, 240, 67 Pac. 411; *Peay v. Salt Lake City*, 11 Utah, 331, 40 Pac. 206, 207; *Edd v. Union Pac. Coal Co.*, 25 Utah, 293, 71 Pac. 216, 217.) Witness Krebs was a civil engineer, called on behalf of the defendant. Krebs had been over the work a number of times and made estimates and classifications of the work. Our defense was that the defendant was doing this work under the directions and supervision of the engineers of the Oregon Short Line Railroad, and plaintiffs' complaint also alleges that all work was done under the directions and supervision of the engineers of the Oregon Short Line Railroad. If Mr. Krebs had been permitted to have answered those questions, he would have explained fully to the jury those apparent discrepancies that appear in these estimates that were sent to the plaintiffs. All these estimates came from the Oregon Short Line Railroad; they were first given to the defendant and then defendant sent them to the plaintiffs. Krebs would have explained to the jury in detail that the monthly estimates were only approximate, a sort of guess for the work done until final estimate came in; that neither the railroad company nor the defendant nor the plaintiffs would know how much work had been done or what its classification was until the final estimates, and that monthly estimates are liable to be changed entirely on the final estimate. It would hardly seem necessary to cite authorities on the proposition that simple discrepancies in a written account can be explained by oral testimony. This proposition is elementary. (*Atlantic R. R. Co. v. Bank*, 19 Wall. 548, 22 L. ed. 196; *Chicago v. Sheldon*, 9 Wall. 54, 19 L. ed. 597; *Murray v. Aiken Co.*, 37 S. C. 468, 16 S. E. 147; *Galveston Ry. Co. v. Johnson*, 74 Tex. 256, 11 S. W. 1113; *St. Joseph Depot Co. v. Chicago*, 89 Fed. 657, 32 C. C. A. 284; *Harnickle v. Brown*, 45 N. Y. Sup. Ct. 350; 2 Wharton on Evidence, secs. 954, 955; *Jenny Lind Co. v. Bauer*, 11 Cal. 194; *Auserais v. Nagles*, 74 Cal. 67, 15 Pac. 371.)

Argument for Respondents.

Thomas F. Terrell, for Respondents.

The character and effect of an averment that may be uncertain in one of its clauses is not limited to a construction of that clause merely, but the averment is to be considered as a whole, and in connection with the entire complaint. (*Bates v. Babcock*, 95 Cal. 479, 29 Am. St. Rep. 133, 30 Pac. 606, 16 L. R. A. 745.) It may be conceded that the first cause of action is somewhat ambiguous in the allegations fixing the classification under the contract, but the defendant well knew and understood what the exact issue was, and by their answer cured all ambiguity that ever existed in the allegations of the complaint. A defect in a complaint may be cured by allegations in the answer. (*State v. Thum*, 6 Idaho, 323, 55 Pac. 858.) Where in an action for services both parties testify to an express contract, but differed as to the amount to be paid, held that evidence as to the value of such services was properly allowed. (*Richardson v. McGoldrick*, 43 Mich. 476, 5 N. W. 672; *Campau v. Moran*, 31 Mich. 280; *Misner v. Darling*, 44 Mich. 438, 7 N. W. 77, 78; *Kirk v. Wolf Mfg. Co.*, 118 Ill. 567, 8 N. E. 815; *Allison v. Harning*, 22 Ohio St. 138.) Where the evidence adduced on both sides is in direct conflict and pretty evenly balanced as to the contract price, evidence that the cost of performance was greatly in excess or greatly below such contract price might afford some reasonable ground for believing that the contract was for the price nearest the cost. (*Valley Lumber Co. v. Smith*, 71 Wis. 304, 5 Am. St. Rep. 216, 37 N. W. 412, 413; *Rauch v. Scott*, 68 Pa. St. 234; *Swain v. Cheeney*, 41 N. H. 232; *Moore v. Davis*, 49 N. H. 45, 6 Am. Rep. 460; *Kidder v. Smith*, 34 Vt. 294; *Johnson v. Harder*, 45 Iowa 677; *Abbott's Trial Evidence*, p. 305.) The respondents deny that there is any variance, but claim that the proof made was fairly within the allegations of the complaint and the issues made by the pleadings. (Idaho Code Civ. Proc., sec. 3237.) Where the variance is not material, as provided in the last section, the court may direct the facts to be found according to the evidence, or may order an immediate amendment without costs. (Idaho Code Civ. Proc., sec. 3238; *Hawkins v. Pocatello Water Co.*, 3 Idaho, 766, 35 Pac. 711; *People v. Slocum*, 1 Idaho, 62-74; *Lee v. Southern Pac. R. R. Co.*, 116 Cal. 97, 58 Am. St. Rep.

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140, 47 Pac. 932, 28 L. R. A. 71; *Thompson v. Reno Sav. Bank*, 19 Nev. 242, 3 Am. St. Rep. 883, 9 Pac. 121; *Kelley v. Clark*, 21 Mont. 291, 69 Am. St. Rep. 668, 53 Pac. 959, 42 L. R. A. 621; *Aulback v. Dahler*, 4 Idaho, 654, 43 Pac. 322.) The cause was submitted to a disinterested jury, who saw the witnesses, heard them testify, saw their demeanor on the stand, and upon due consideration have rendered a verdict in favor of respondents. This verdict, to say the very least of it, is based upon conflicting evidence, and the rule is well settled that a verdict based upon conflicting evidence will not be disturbed on appeal. (*Babcock v. Maxwell*, 29 Mont. 31, 74 Pac. 64; *Lawrence v. Pederson*, 34 Wash. 1, 74 Pac. 1011; *Green v. Miller* (Ariz.), 73 Pac. 399; *Durfee v. Seale*, 139 Cal. 603, 73 Pac. 435; *Hunter v. Guth* (Colo. App.), 73 Pac. 1089; *Parke v. Boulware*, 9 Idaho, 225, 73 Pac. 19.)

SULLIVAN, C. J.—This is an action brought by the respondents as copartners against the appellant, the Utah Construction Company, upon a verbal contract, to recover an alleged balance due for work and labor performed by the respondents upon the Oregon Short Line Railroad between mile-posts 280 and 290 in the state of Montana.

The complaint contains four separate counts or causes of action, but the trial proceeded upon the first and third causes stated in the complaint. Said contract was entered into on or about the fifteenth day of May, 1900, and the work to be performed thereunder consisted in the construction of grades, fills and embankments on the right of way of said railroad according to certain plans and under the supervision and direction of engineers of the railroad company. The respondents were to be paid for said work from time to time as the work so done by them should be ascertained from estimates to be made by engineers, and ten per cent of the value of all work done was to be withheld until the work was completed, and any balance remaining unpaid at that time was to be paid to the respondents. It is alleged in the complaint that the appellant agreed in said contract to pay to the respondents the sum of ten cents per cubic yard for all earth work done in pursuance of said contract, which allegation is denied by the answer, and it is

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averred therein that only nine and one-half cents per cubic yard was to be paid for the earth work. It is also alleged in the complaint that the respondents were to receive twenty-five cents per cubic yard for all loose rock work done by them, and that by the terms of said contract, all work done by the respondents of a similar character to the work done on the south end of the sidetrack at Dell station in the state of Montana should be classed as loose rock work and paid for at the rate of twenty-five cents per cubic yard; and that in pursuance of said contract the loose rock work so done under said contract amounted to 11.331 $\frac{1}{2}$ cubic yards, and that said number of yards should have been classed as loose rock work and paid for at the rate of twenty-five cents per cubic yard.

The answer of appellant denies that it was agreed that all or any of the work to be performed under said contract of a similar character to the work on the south end of said track at Dell station should be classed as loose rock work, or to be paid for at the rate of twenty-five cents per cubic yard, and denies that there was any agreement that such work should be so classified and paid for at the rate of twenty-five cents per cubic yard, and also denies that the respondents handled, moved, carried or deposited in the construction and repair of the road-bed of said railroad, or at all, for the appellants, more than 22.663 cubic yards, and denies that they did any rock work at all, but admits that the engineers of said railroad in making their estimates classified and allowed as loose rock work 293 cubic yards of the work done by the respondents, and paid them therefor at the rate of twenty-five cents per cubic yard.

The pleadings put in issue the amount of work done by the respondents, the classification of the work, and the sum to be paid per cubic yard for the earth work. A general demurrer to each cause of action was filed, and without argument was submitted to the court and overruled *pro forma*. The cause was tried by the court with a jury, and, on a verdict, judgment was rendered in favor of the respondents for the sum of \$1,454 and costs of suit. This appeal is from the judgment and order denying a new trial and is presented on a statement of the case.

Numerous errors are assigned and are discussed by counsel for appellant under seven different heads. The first is that

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the court erred in overruling the demurrer, the ground of the demurrer being that the complaint failed to state a cause of action. One of the main contentions is that there is no allegation that there was any error, mistake or fraud in the estimates furnished by the engineer, and for that reason the complaint does not state a cause of action. The complaint alleges that by the terms of said contract all work of a similar character to the work done on the south end of the sidetrack at Dell station, Montana, should be classed as loose rock work, and paid for at the rate of twenty-five cents per cubic yard; that under said contract plaintiffs handled, moved, carried and deposited in the construction and repair of the roadbed of said railroad 22.663 cubic yards of earth and loose rock, and that one-half of said 22.663 or 11.331½ cubic yards should have been and is entitled to be classed as loose rock work and paid for at the rate of twenty-five cents per cubic yard. While the latter allegation is not a direct allegation that said 11.331½ cubic yards of rock work was similar in character to the work on the south end of the sidetrack at Dell station, and does not directly aver that there was a mistake in the estimates of the engineer, they are equivalent to such allegations, and the necessary inference is that the plaintiffs had done that amount of work which was similar to that at the south end of the sidetrack at said station that ought to have been classed as loose rock work and paid for at the rate of twenty-five cents per cubic yard, and that it had not been so classified and paid for. We think the allegations of the complaint are sufficient on said points and state a cause of action; and under the answer of the defendant it is clear that appellant was not misled on the trial of the case. It is contended that respondent did not object to the correctness of the estimates furnished them within a reasonable time after they were delivered to them, and for that reason they became an account stated and are estopped from objecting to them at this time. There was evidence introduced on the question and the court instructed the jury thereon as follows: "The jury are instructed that where a party sends by mail a statement of account to another, with whom he had dealings, which is received, but not replied to within a reasonable time, the acquiescence of the party is taken as an admission that the

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account is correctly stated; and what is a reasonable time in this connection is a question for the jury to determine, under all the circumstances of the case, considering the nature of the business, the distance of the parties from each other, and the means of communication between them." That instruction correctly states the law and the jury found from the evidence in favor of the respondents, and we are not disposed to set aside their verdict on the ground that it is not supported by the evidence.

Counsel for appellant contends that the failure of the court to compel the respondents to elect whether they would go to trial upon the first or second cause of action was error. There is nothing in this contention, for the case was tried all the way through upon the first cause of action—that is, upon the theory that the action was upon an express contract and not upon a *quantum meruit*, that being the theory of the second cause of action. The court instructed the jury that this action was brought upon a verbal contract. The appellant admits that it was brought upon a verbal contract, and it was tried upon the theory that it was based upon an express contract. We do not lose sight of the fact that there was a third cause of action stated in the complaint and tried in this action, but that was in regard to a small sum of money that had been transferred from one account to another. While the court did not sustain, in terms, appellant's motion to compel the respondents to elect, it did that in effect by confining the trial to the first and third causes of action stated in the complaint.

Assigned errors 3, 4, 8, 9, 11, 14, 15, 17, 18 and 20 will be considered together. They are in regard to the action of the court in permitting certain witnesses for the respondent to testify as to the difficulty and reasonable value of the work performed by them in response to such questions as, "How many men did it require to break the soil which you have described?" "What effect, if any, did the ground which you have described have upon the horses and teams which you used?" "How was the plow manned and operated?" and questions of similar import. It is contended that those questions were improper, the question being, not the reasonable value of the services performed, but the contract price thereof. It was in dispute

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whether the respondents were to receive nine and one-half or ten cents per cubic yard for the dirt work and also as to the classification of the work done. Respondents claimed that all work done by them that required more than six horses to break the ground was to be classified as loose rock work, and it was under that claim that the court permitted that evidence to be introduced, that that material was the same as that in the south end of the sidetrack at Dell station and should be classified as loose rock work under that contract, there being a difference of fifteen cents per cubic yard, at least, between dirt work and loose rock work, and a dispute between the parties as to whether the work referred to should be classed as loose rock work or dirt work. We think it was proper for the court to admit evidence of real value of that class of work under the facts of this case.

It was held in *Richardson v. McGoldrick*, 43 Mich. 476, 5 N. W. 672, that where in an action for services both parties testified to an express contract, but differed as to the amount to be paid, held that evidence as to the value of such services was properly allowed. And in *Misner v. Darling*, 44 Mich. 438, 7 N. W. 77, which was a case where the contract price for sawing lumber was in dispute, one party testifying that it was to be four dollars per thousand and the other that it was to be three dollars and fifty cents. As bearing upon the probabilities that he was correct rather than the plaintiff, the defendant offered to show what the sawing of the lumber was fairly worth, but the offer was ruled out. The appellate court held that such evidence was admissible.

In *Valley Lumber Co. v. Smith*, 71 Wis. 304, 5 Am. St. Rep. 216, 37 N. W. 412, it was held that where the evidence adduced on both sides is in direct conflict, and pretty evenly balanced as to the contract price, evidence that the cost of performance was greatly in excess or greatly below such contract price, might afford some reasonable ground for believing that the contract was for the price nearest the cost. (*Campau v. Moran*, 31 Mich. 280; *Kirk v. Wolf Mfg. Co.*, 118 Ill. 567, 8 N. E. 815; *Allison v. Harning*, 22 Ohio St. 138.) We think the evidence objected to was properly admitted.

Counsel for appellant discusses assignments 5, 7, 12, 13, 16,

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19, 20, 21 and 22 together. Those assignments refer to the testimony of certain witnesses, and the following question will indicate the kind of evidence referred to: "What per cent of the work performed by plaintiffs under their contract was similar in character to the work done upon the south end of the Dell sidetrack?" It is contended that that question and others of similar import were asked of plaintiff's witnesses, and were objected to on the part of the appellant on the ground that said questions were immaterial and were not embraced in any issue presented by the complaint.

Since we have above held that the allegations of the complaint were sufficient to put in issue the fact whether any of the work performed by respondents was of a similar character to the work done on the south end of the sidetrack at Dell station, that disposes of the question here involved. The court having held that that fact was put in issue, it was proper to admit evidence to show the amount of work done by the respondents of similar character to the work done on south end of said sidetrack.

Under the provisions of section 4225, Revised Statutes, no variance between the allegations and the proof is deemed to be material unless it had actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits. If the allegations of the complaint were defective or uncertain on the point referred to, the denials and averments of the answer on that point are amply sufficient to put that question in issue and show that the appellant was not misled in making its defense.

Under the fifth head five assignments are discussed and refer to certain evidence excluded by the court. It appears that there was a slight discrepancy between some of the monthly estimates and the final estimates as to the number of cubic yards of loose rock work, and counsel for appellant desired to have their witnesses explain such discrepancy, and several questions were asked of witness Krebs for that purpose. Such evidence was objected to by counsel for respondents. The witness was not permitted to answer these questions. The court should have permitted the witness to explain that discrepancy. However, it appears from the record that the witness Green

Points decided.

on behalf of the appellant testified that he gave the monthly estimates of the work being done, and stated: "Monthly estimates were arrived at by going over the work and estimating what had been done. These estimates are not accurate and are liable to be corrected on the final estimates." This was an explanation of the variance between the monthly estimate and the final estimate, and clearly stated to the jury that the monthly estimates were not accurate, only approximate, and subject to correction by the final estimate. While we think the court should have permitted witness Krebs to explain the variance between those estimates, we do not think it was reversible error not to permit him to do so as such discrepancies were explained by another witness on behalf of the appellant.

We have examined the assignments of error in regard to certain instructions given by the court, and we think they state the law as applied to the evidence and theory of the case upon which it was tried, and conclude, on a review of the entire evidence, that the verdict is sustained by it. The judgment of the trial court is affirmed, with costs in favor of the respondents.

Stockslager, J., and Ailshie, J., concur.

(June 22, 1904.)

FIRST NATIONAL BANK OF HAILEY v. GLENN.

[77 Pac. 623.]

MORTGAGE—ACKNOWLEDGMENT BY MARRIED WOMEN—EVIDENCE OF NOTARY—SIGNATURE BY MARK—WITNESS TO SIGNATURE BY MARK—ADOPTION OF SIGNATURE—USURY—AGREEMENT TO PAY TAX ON LOAN—VOID CONTRACT—CLAIM AGAINST ESTATE OF DECEASED—ALLOWANCE OF MORTGAGE INDEBTEDNESS—MORTGAGEE MAY FORECLOSE.

1. Where a notary explains to a married woman that the instrument to which her name is appended is a mortgage upon certain real estate, and the nature and contents thereof, and the property encumbered thereby, and she thereupon replies that whatever her husband does or says is all right with her and that he is a good man and she has confidence in him, and will do whatever he does, *held*, that such facts constitute a sufficient acknowledgment and justify the notary in attaching his certificate of acknowledgment in due form to such instrument.

Points decided.

2. Where a married woman acknowledges an instrument in due form, and at the time of such acknowledgment her name is affixed to such instrument as follows: "Jennie X Glenn," but her

mark
signature by mark is not witnessed by any person writing his name as a witness thereto, *held*, that by such acknowledgment she adopted and approved the signature as her own and thereby acknowledged the execution of the same as her act; and the officer's certificate of her acknowledgment attached thereto is a sufficient witnessing of her signature by mark and constitutes a compliance with section 16, Revised Statutes, which provides that "Signature or subscription includes mark, when the person cannot write, his name being written near it, and witnessed by a person who writes his own name as a witness."

3. An officer cannot lawfully take the acknowledgment to an instrument of a person whose name is not at the time affixed to the instrument, and does not appear thereon.

4. Under section 2960, Revised Statutes, an acknowledgment to the execution of an instrument carries with it an adoption of the signature thereto, and recognition of the same as the name and signature of the person making such acknowledgment.

5. A notary who has taken the acknowledgment to a mortgage should not be allowed to give testimony upon the foreclosure thereof impeaching, or tending to impeach, his certificate of acknowledgment.

6. The certificate of acknowledgment to an instrument made by the officer constitutes his official statement and declaration made at the time of the act as to the truth and accuracy thereof, and is more likely to be true and correct than the memory of such person in years afterward.

7. Where a mortgage provided that a debt should draw interest at the highest legal rate permissible at the time of the execution thereof, and in addition thereto provided that the debtor should pay the taxes on the mortgage and debt secured thereby, *held*, that such stipulation for the payment of taxes on the loan did not taint the contract with usury; since section 1425, Revised Statutes, provided that "Every contract by which a debtor agrees to pay any tax or assessment on money loaned, or any mortgage, deed of trust, or other lien, shall as to such tax or assessment, be null and void."

8. An action may be maintained in the district court for the foreclosure of a mortgage upon real estate where the mortgagor is deceased, although the debt secured by the mortgage has been presented as a claim to the administrator and allowed by him and
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also by the probate judge of the county, where the only object of the action is to make the debt out of the mortgaged property, and the creditor waives all recourse against any other property of the estate of the deceased.

9. Section 5470, Revised Statutes, which provides that "No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint," does not constitute any bar to the foreclosure of a mortgage by the holder thereof against the estate of a deceased person although the claim thereby secured has been duly and regularly presented to the administrator for allowance.

(Syllabus by the court.)

APPEAL from the District Court of the Fourth Judicial District. Honorable Kirtland I. Perky, Judge.

The First National Bank of Hailey, as assignee and owner and holder of the mortgage against the estate of G. P. Glenn, deceased, and others, commenced its action for the foreclosure thereof. Judgment was entered for the defendants, and from such judgment and an order denying a motion for a new trial, plaintiff appeals. Judgment reversed.

R. F. Buller, for Appellant.

The notary's certificate of acknowledgment cannot be impeached by his own evidence. (*Shapleigh v. Hull*, 21 Colo. 419, 41 Pac. 1108; *Northwestern etc. Bank v. Rauch*, 5 Idaho, 752, 57 Pac. 766.) This evidence was also inadmissible, for the further reason that there was no allegation of fraud, accident or mistake in taking and certifying the acknowledgment of the mortgage. In the absence of fraud, accident or mistake, the certificate of the notary in due form is conclusive of the material facts therein stated. (*Banning v. Banning*, 80 Cal. 271, 13 Am. St. Rep. 156, 22 Pac. 210; *Grant v. White*, 57 Cal. 141; *Baldwin v. Snowden*, 11 Ohio St. 203, 78 Am. Dec. 303; *Jones on Mortgages*, 538.) Public policy requires that the certificate should prevail over the unsupported testimony of an interested party, otherwise there would be no permanency and but slight

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security in titles to lands. (*Gray v. Law*, 6 Idaho, 559, 96 Am. St. Rep. 280, 57 Pac. 435; *Russel v. Baptist Theological Soc.*, 73 Ill. 337.) In *Clough v. Clough*, 73 Me. 487, 40 Am. Rep. 386, where the grantor's name was written by the grantee and the grantor subsequently acknowledged the deed, the court said: "If one acknowledges and delivers a deed which has his name and seal affixed to it, the deed is valid, no matter by whom the name and seal were affixed. The acknowledgment and delivery are acts of recognition so distinct and emphatic that they will preclude the grantor from afterward denying that the signing and sealing were his acts. They are his by adoption." (9 Am. & Eng. Ency. of Law, p. 145, and cases cited.) At the time this mortgage was made mortgages were taxable in Idaho, and the same revenue law which made them taxable also contained section 1425, which says: "Any agreement made by a mortgagor to pay the taxes assessed upon the mortgage shall be void." The law of usury is in its nature penal, and is therefore to be strictly construed. Reason and justice dictate that the forfeiture imposed by it ought not to be visited upon those who are innocent of any intention of violating its provisions. (*Dickerson v. Day*, 31 Iowa, 444.) In *Balfour v. Davis*, 14 Or. 47, 12 Pac. 89, it is said that in order to constitute usury there must be a corrupt intent to take more than the legal rate of interest for the use of the money loaned. We submit that there was no corrupt intent, nor any intent whatever, not even a contract; nothing but a void clause in the mortgage, inserted, for aught that appears by the mortgagors themselves, without even the knowledge or consent of the mortgagee. Where the holder of the mortgage does not present his claim against the estate, his recourse is limited to the mortgaged property. (*McGahey v. Forest*, 109 Cal. 63, 41 Pac. 817.) If a mortgage is executed by husband and wife upon a homestead which is afterward set apart to the surviving spouse, the mortgagee can neither maintain his action to foreclose nor have a personal judgment against the survivor unless he first presents his claim against the estate of the deceased spouse. (*Hibernia Sav. etc. Soc. v. Thornton*, 109 Cal. 427, 50 Am. St. Rep. 52, 42 Pac. 447; *Bull v. Cole*, 77 Cal. 54, 11 Am. St. Rep. 235, 18 Pac. 808.) If the administrator improperly pays out money of the estate to remove an encum-

Argument for Respondent.

brance, he does so at his own risk, and if any loss accrues he must bear it. (*In Matter of Estate of Knight*, 12 Cal. 200, 73 Am. Dec. 531; *In re Huelsman's Estate*, 127 Cal. 275, 59 Pac. 776.)

W. C. Howie, for Respondent.

It is alleged by both plaintiff and defendant, and proven in the evidence, that G. P. Glenn and Jennie Glenn were husband and wife, and is conceded that they were living on the land as a home. Then under section 2921, Statutes of 1887, the land could not be conveyed or encumbered unless both husband and wife joined in the execution of the instrument. Execution includes signing, sealing and delivering. (1 *Bouvier's Law Dictionary*, 714; 11 *Am. & Eng. Ency. of Law*, 2d ed., 584; *Pico v. Carillo et al.*, 7 Cal. 30; *In re Will of Bridget Guilfoyle*, 96 Cal. 598, 31 Pac. 553, 22 L. R. A. 370; *Watson v. Billings*, 38 Ark. 278, 42 Am. Rep. 1.) Courts universally hold in the matter of acknowledgments, if the certificate is wholly false and the supposed grantor has done nothing active herself to hold out to the world that it is genuine by which she can be bound by estoppel, the certificate is the same as forged and the instrument void in the hands of everybody. (*Le Mesnager v. Hamilton*, 101 Cal. 532, 40 Am. St. Rep. 81, 35 Pac. 1054; *Phillips v. Bishop*, 31 Neb. 853, 48 N. W. 1106; *Harrison v. Oakman*, 56 Mich. 390, 23 N. W. 164.) In *Vermont Loan etc. Co. v. Hoffman*, 5 Idaho, 376, 95 Am. St. Rep. 86, 49 Pac. 414, 37 L. R. A. 509, where the rate of interest charged was but six per cent when the statute permitted eighteen per cent, and the only thing was that the coupons should draw interest at six per cent, can it be claimed that the mortgagee wanted to charge more than the legal rate? Yet the court imposed all the penalties of our usury law; besides at the time the contract was entered into over half the lawyers in the state were of the opinion that interest bearing coupons were legal. That it makes no difference under what or how many names or guises the money taken may be, it will not evade the usury law. See this court's decision in *Stevens v. Home Savings etc. Assn.*, 5 Idaho, 741, 51 Pac. 779; *Fidelity Sav. Assn. v. Shea*, 6 Idaho, 405, 55 Pac. 1022. And for other authorities along the same line see *Harmon v.*

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Lehman, 85 Ala. 379, 5 South. 379, 2 L. R. A. 589; 27 Am. & Eng. Ency. of Law, 1st ed., 1009 (bonus added to interest), 1017 (rents), and 1021-1026. (*Walter v. Foutz*, 52 Md. 147; *Andrews v. Poe*, 30 Md. 485; *Harris v. Wicks*, 28 Wis. 198; *Hewitt v. Dement*, 57 Ill. 500.) The provision that debtor will pay the taxes on the debt secured, in addition to the full legal rate, renders the contract usurious. (*Mortimer v. Prichard*, 1 Bail. Ch. (S. C.) 505 (new ed., 496); *Meem v. Dulaney*, 88 Va. 674, 14 S. E. 363; 27 Am. & Eng. Ency. of Law, 1st ed., 1015; 3 Parsons on Contracts, 128; *Marsh v. Martindale*, 3 Bos. & P. 154; *Maine Bank v. Butts*, 9 Mass. 49.)

AILSHIE, J.—The First National Bank of Hailey commenced this action on the twenty-fourth day of July, 1895, for the foreclosure of a real estate mortgage executed by Oliver S. Glenn and Emma Glenn, his wife, and G. P. Glenn and Jennie Glenn, husband and wife. The mortgage was executed on the twenty-seventh day of July, 1887, to secure the payment of three promissory notes aggregating the sum of \$8,733, and bearing interest from August 1, 1888, at the rate of one and one-half per cent per month in favor of H. E. Miller. Miller sold and transferred the notes and mortgage to appellant, prior to the commencement of this action. At the time of the execution of the notes and mortgage, G. P. Glenn and wife were residing upon that portion of the land upon which the foreclosure was sought in this action, and the same was at that time the community property of the husband and wife. In 1889, G. P. Glenn died intestate, leaving his widow, Jennie, and six children surviving him. Payments had been made on the mortgage indebtedness from time to time, and after the death of G. P. Glenn, the mortgagee Miller, duly and regularly presented his claim for the amount due in principal, interest and taxes to the administrator of the estate, and the same was thereupon allowed by the administrator and also by the probate court of Elmore county. After the allowance of the claim the administrator paid something over \$2,000 thereon. Under the statute as it existed at the time of the execution of this mortgage it was lawful to charge and collect interest at the rate of one and one-half per cent per month. It was also the law at that time that all mortgages were taxable; and under section 1425 of the Revised Stat-

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utes then in force it was provided that: "Every contract by which a debtor agrees to pay any tax or assessment on money loaned, or any mortgage, deed of trust, or other lien, shall as to such tax or assessment, be null and void." By the terms of the notes and mortgage given in this case the debtors contracted to pay the highest legal rate of interest permissible under the laws of the then territory; and, in addition thereto, it was provided that the debtors should pay all taxes that might be assessed against the mortgaged property and also all taxes that might be assessed against the mortgage itself, or the debt secured thereby. Personal service was made upon all the defendants, and also upon the guardian for the six minor children of the deceased, G. P. Glenn. The action was dismissed as to Oliver S. Glenn and Emma Glenn, owing to their having no interest in the land, and the default of Jennie Glenn was duly and regularly entered. The minors, however, all appeared through their guardian and answered, and contested the action at every step of the proceedings and are the respondents in this action. The answer denies the execution of the mortgage by the defendant Jennie Glenn. It also alleges that she never acknowledged that instrument in any manner or form. It also sets up the defense of usury and charges that the contract was a usurious contract. It was further alleged as a separate defense that the claim had been presented to the administrator of the estate of G. P. Glenn, deceased, and that part payments had been made thereon, and that the mortgagee was thereby barred from maintaining his action upon the contract and to foreclose the mortgage.

The case was tried before the judge of the fourth judicial district sitting in Elmore county; but before it was finally submitted upon that trial, the judge, Justice Stockslager, now of this court, who heard the testimony, was succeeded by Judge Perky, and the case was therefore retried and judgment was entered November 14, 1902. Soon thereafter one of the plaintiff's attorneys died and the case had slow progress in getting into this court. The trial judge found that the mortgage was never executed by the defendant Jennie Glenn, and that the execution thereof was never acknowledged by Jennie Glenn. He also found that the contract was usurious and that the principal of the loan had been fully paid and judgment was thereupon en-

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tered dismissing the action and for costs against the plaintiff. Since the court found that the mortgage was never executed nor acknowledged by the defendant, Jennie Glenn, we will consider both of these questions together. The mortgage which was introduced in evidence appeared to have been executed in due form and by all the parties, except by the defendant Jennie Glenn. Her name was affixed to the mortgage as follows:

her

“Jennie X Glenn,” but this signature by mark was not witnessed
mark

by any person writing his name as a witness thereto. Her acknowledgment, however, as shown by the certificate of the notary who took the same, seems to have been duly and regularly made and taken. At the trial she appeared and testified as a witness on behalf of the minor children who were defending, and testified that she never signed her name to the mortgage and that she never made her mark, and that she never saw the mortgage. She also denied acknowledging the same, but did admit that the notary came to see her about the matter, and claims that she did not understand anything about it. It should be observed that she is an Indian woman, and while she speaks the English language fairly well and appears to understand it reasonably well, as disclosed by her answers given on the witness-stand, still, like most of her people, she did not fully grasp all that was said to her, and especially business methods and ordinary legal proceedings. Other witnesses who were about the house at the time the notary came to take this acknowledgment, testify to his being there and having the mortgage with him, and going over and sitting down by the table or desk where she was seated and explaining to her the contents and nature of the mortgage, and that she replied in substance that whatever her husband would do she would do, saying: “But Gus Glenn, he good man, and what Gus say and do I say and do all right.” The defendants at the trial called the notary who took the acknowledgment and examined him with a view to contradicting his certificate and showing that no real acknowledgment had ever been taken from this woman. The plaintiffs objected to the notary testifying to any fact that would in any manner tend to impeach his certificate, but the court overruled the objection

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and permitted the testimony. We think the objection by the plaintiff was well taken. No notary should be allowed to come into court upon the foreclosure of a mortgage and give testimony impeaching his certificate to the mortgage which is being foreclosed. In the first place, the certificate is made at the time of the acknowledgment and is the solemn declaration of the officer in his official capacity, under his hand and seal, as to the truth and accuracy of the statements it contains, and it is much more likely to be true and correct than the memory of the person in years afterward. This case is a practical illustration of the danger of allowing an official to come in and contradict his own certificate at a period in this case of more than fourteen years after it was made. After persons have relied upon the faith and correctness of his official statement and invested their money and rights have grown up thereunder, the person who acted as such official and made such certificate should not be heard in a court of justice disputing its correctness. (*Shapleigh v. Hull*, 21 Colo. 419, 41 Pac. 1108; *Northwestern etc. Bank v. Rauch*, 5 Idaho, 752, 51 Pac. 764; *Hockman v. McClanahan*, 87 Va. 39, 12 S. E. 230; *Hawkins v. Forsyth*, 11 Leigh, 301; *Central Bank of Frederick v. Copeland*, 18 Md. 305, 81 Am. Dec. 597; *Johnson v. Wallace*, 53 Miss. 331, 24 Am. Rep. 699.) In this case, however, the evidence of the notary was as much in support of the certificate as in contradiction thereof. He testified to explaining to the witness the contents of the instrument and its purpose and effect, and that, while she did not appear to understand it very well, she told him it was all right with her if it was with her husband, and that whatever he did or said was all right with her. He also testifies that after going over the matter, making as full explanation as he could, and conversing with her about it, he considered she had made a sufficient acknowledgment of the execution of the instrument and that she was satisfied therewith, and that he felt justified in attaching the certificate of acknowledgment thereto. We think his conclusion was correct, and that he was justified in so certifying. (*Banning v. Banning*, 80 Cal. 273, 13 Am. St. Rep. 156, 22 Pac. 210; *De Arnaz v. Escandon*, 59 Cal. 489.) The record here shows that the wife reposed perfect confidence in her husband and was entirely satisfied with whatever

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he said and did in business matters. We think an acknowledgment to this effect is a compliance with the statute. (*North-western etc. Bank v. Rauch, supra; Gray v. Law*; 6 Idaho, 559, 96 Am. St. Rep. 280, 57 Pac. 435.) More especially should this be true where, as in this case, it is admitted that the husband and the family of which he was the head received the full consideration for which the mortgage was executed, and there is no pretense or contention that any fraud or deception was practiced upon either the wife or husband. It further appears in this case that the money for which this mortgage was executed was received and used by Glenn and his wife in redeeming this identical tract of land from a sheriff's sale on foreclosure of a previous mortgage, and that the time for redemption was just about expiring. The money, therefore, sought to be recovered in this action is, practically speaking, the purchase price for the tract of land. This brings us to the question of the signature to the mortgage by the defendant Jennie Glenn.

Section 16 of the Revised Statutes which is devoted to definitions of various words and phrases used in the statutes defines a signature as follows: "Signature or subscription includes mark, when the person cannot write, his name being written near it, and witnessed by a person who writes his own name as a witness." It is argued by respondent that under this statute Jennie Glenn's "signature" does not appear to the mortgage, since it is shown on its face to have been made by mark and there is no witness thereto. We think this contention would be correct if the signature were found in this condition to an unacknowledged instrument, or one that is not required by law to be acknowledged. But by the provisions of section 2921, Revised Statutes, it is provided that the community property occupied as a residence cannot be encumbered "unless both husband and wife join in the execution of the instrument by which it is so . . . encumbered, and it be acknowledged by the wife, as provided in chapter 3 of this title." Section 2960 as found in chapter 3 referred to in section 2921, *supra*, provides the form of acknowledgment to be made by a married woman to an instrument affecting title to real property in which she has any interest. An examination of the acknowledgment will disclose that an officer is required to certify that "the person whose

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name is subscribed to the within instrument, described as a married woman," personally appeared before him and that, "upon examination without the hearing of her husband, I made her acquainted with the contents of the instrument; and thereupon she acknowledged to me that she executed the same and that she does not wish to retract such execution." It is clear that an officer would not be justified in taking and certifying an acknowledgment of any person to an instrument whose name is not affixed to the instrument and does not appear thereon; and it is equally clear that in order to make a good acknowledgment the person executing the instrument must adopt the name appearing thereon and the execution thereof as his or her own. The officer taking the acknowledgment is not required to see the person sign the instrument, nor is he required to witness the instrument; but he is required to ascertain whether or not the party acknowledges the instrument as his or her obligation or contract and as having been executed by him or her. All these things appear from the certificate in this case to have been done regularly. The name of Jennie Glenn appeared subscribed to the instrument; whether by her, her husband, or some other person, she approved of it, adopted it and acknowledged it as her own. (See *Bartlett v. Drake*, 100 Mass. 174, 97 Am. Dec. 92, 1 Am. Rep. 101; *Clough v. Clough*, 73 Me. 487, 40 Am. Rep. 386; *Harris v. Harris*, 59 Cal. 620; *Kerr v. Russell*, 69 Ill. 666, 18 Am. Rep. 634.) To "execute" an instrument, it is true, includes signing it; but the admission by a party whose name is appended to an instrument that he executed it is as binding upon the party contracting as if the person to whom the admission is made had seen him affix his name thereto. Such admission becomes legal evidence of the fact. We therefore conclude that the notary's certificate, that the party whose name is affixed acknowledged the execution of the instrument, is as good a witness to the signature by mark as if he had written his name at the foot of the document "as a witness to her signature by mark." In a case like this where there is no charge of deception or fraud, and where it is not denied that the contracting parties received and enjoyed all the fruits of their contract and the full consideration therefor, it would be an injustice to allow a recovery to be defeated in a court of equity by reason of such

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a slight deviation from the forms usually recognized and followed.

We next come to appellant's contention that the court erred in finding that the contract was usurious. This finding was predicated upon the clause found in the mortgage providing that the debtors should pay taxes on the mortgage and the debt secured thereby. The defendants maintained that, since the mortgage was drawn for the highest legal rate of interest permissible, a stipulation for the payment of taxes on the mortgage in any sum whatever had the legal effect of raising the rate above that allowed by law, and therefore brought the contract within the provisions of section 1266, Revised Statutes, and made it usurious. In support of this proposition respondent has cited *Mortimer v. Prichard*, 1 Bail. Eq. (S. C.) 505, and *Meem v. Dulaney*, 88 Va. 674, 14 S. E. 363. In *Mortimer v. Prichard*, the South Carolina court held that where a contract provided for the highest rate of interest and also provided for the debtor paying the state and city taxes, upon its face it would appear usurious, but that where, as in that case, it appeared that the parties acted in good faith and had taken the advice of counsel as to the legality of such a contract, there was no corrupt intent, and the court held the contract legal. In *Meem v. Dulaney*, the Virginia court of appeals held a contract very similar to the one at bar usurious.

In *Banks v. McClelland*, 24 Md. 62, 87 Am. Dec. 594, the supreme court of Maryland in the syllabus to that case say: "An agreement by the mortgagor to pay the taxes on the mortgage debt is not usurious," and the question of usury in such a case is there held to depend upon the particular circumstances of the case. We find that in none of the cases cited by respondent on this question has there been a statute similar to ours declaring such stipulations void.

Since section 1425, as it stood when this contract was entered into, provided that every contract whereby the debtor agreed to pay the taxes on the money loaned or the mortgage was null and void, the stipulation, therefore, found in this mortgage was never such as could be enforced. If "null and void," it could never have had any life or vitality in it. If void from the beginning, it is difficult to see how it ever obtained the energy

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or ability to taint an otherwise legal contract with usury. This statute carried within itself its own penalty for its violation, namely, that the contract should "be null and void." To allow a stipulation which the statute says should be void from the beginning, to have the effect of corrupting the whole contract in which it is found and subject it to the penalties for usury, would be attaching a double penalty to a statute which carries its own penalty with it. It is also worthy of observation that the usury statute of this state does not declare the usurious contract void, but rather imposes a penalty upon both the debtor and creditor. If the contract under consideration were usurious, it would have been the duty of the trial court, not only to declare the penalty against the lender, but also the borrower; and we are not prepared to say that the borrower by inserting a stipulation in his mortgage which the statute says is void, thereby subjects himself to the penalty of a usury statute. On the other hand, the mortgagee in this case testifies that he never knew such a stipulation was in the mortgage until long after its execution, and that he never at any time collected such a tax from the mortgagors, nor did he ever charge them therewith.

In *Re Press Fuller*, 1 Saw. 243, Fed. Cas. No. 5148, a judgment had been entered by confession and provided for a greater rate of interest than allowed by law. It was contended that this made the judgment usurious and subjected it to the penalties of the usury statute. Judge Deady disposes of the usury phase of the question as follows: "There can be no doubt but this provision shows that it was intended that this judgment should draw more than the legal rate of interest. But I do not think a judgment or decree can become usurious by any such means. The code provides the rate of interest a judgment shall bear, and the parties cannot change it by stipulations or terms inserted therein. Such stipulations are simply void—as, for instance, that the interest accruing on a judgment shall be paid annually, and, if not, shall bear interest as principal."

We now come to the last contention made by appellant in this case. It is embodied in the following conclusion of law made by the trial court: "Plaintiff's predecessor, having presented his claim against the estate of G. P. Glenn, de-

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ceased, and having received payment thereon, cannot now maintain this action." Respondent claims that this conclusion of law is justified by section 5470, Revised Statutes of 1887. The provisions of that section are as follows: "No holder of any claim against an estate shall maintain any action thereon unless the claim is first presented to the executor or administrator, except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint." Respondent argues that if the plaintiff could not, in the first instance, maintain his action to foreclose his mortgage without expressly waiving "all recourse against any other property of the estate," then he cannot be allowed to present his claim against the estate, and, after obtaining all he can from the estate, be permitted to foreclose his mortgage, and then waive recourse against any other property of the estate. We have been cited to no authority sustaining this construction of the foregoing statute, and we have been unable to find any to that effect. In California they seem to have changed their statute on this subject from time to time, but at no time do they appear to have had a statute in the exact language of our provision. Still the courts of that state have frequently considered the right of a mortgagee to foreclose both with and without having presented his claim to the administrator and have inferentially touched upon this question in the following cases: *Fallon v. Butler*, 21 Cal. 24, 81 Am. Dec. 140; *Willis v. Farley*, 24 Cal. 500; *Moran v. Gardemeyer*, 82 Cal. 96, 23 Pac. 6; *McGahey v. Forrest*, 109 Cal. 63, 41 Pac. 817; *Hibernia Savings etc. Assn. v. Thornton*, 109 Cal. 427, 50 Am. St. Rep. 52, 42 Pac. 447; *Bull v. Coe*, 77 Cal. 50, 11 Am. St. Rep. 235, 18 Pac. 808. We do not understand the statute to be a bar to the foreclosure of a mortgage simply because the mortgagee presented his claim in due form to the administrator, but when he seeks to maintain his action to foreclose the mortgage, then under the terms of the statute he must waive all recourse against other property. It appears to be conceded by the argument of respondent, and at any rate exists as a fact, that section 5470 does not in express terms forbid the mort-

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gagee foreclosing the mortgage where he has previously presented his claim to the administrator. If that section means what respondents contend it does, it is only by implication and not by express terms. We cannot, however, by mere implication give to a statute like this a meaning or interpretation which will preclude or tend to preclude the creditor pursuing his remedy in a court of equity for the foreclosure of his mortgage. (Idaho Const., art. 5, sec. 20; *Fallon v. Butler*, *supra*; *Pechand v. Rinquet*, 21 Cal. 76; *Willis v. Farley*, *supra*; *Corbett v. Rice*, 2 Nev. 331; *Verdier v. Bigne*, 16 Or. 208, 19 Pac. 64.)

The respondent makes the point that the plaintiff after having received a large sum of money from the estate on the allowance of his claim gains an advantage if he can afterward be allowed to foreclose his mortgage. This is a matter with which the administrator and probate judge have ample authority to deal. If the estate is solvent over and above the family allowances, and such homestead as may be set off by the probate judge, in that case it can make no difference to the estate or any creditor thereof for the reason that the claim should be fully paid, and there would be no occasion for a foreclosure. If, on the other hand, the estate is insolvent, the administrator should not pay and the probate court should not allow paid any secured claim except as the money therefor is made out of the encumbered property. The order of payments and preferences to be made out of an estate is directed by sections 5606 and 5607, Revised Statutes. Provision is also made for the sale of the encumbered property by the probate court where the mortgagee or lienholder has presented his claim under sections 5536 and 5537, Revised Statutes. Under these statutory provisions governing the administration of the estates of deceased persons, a mortgagee can acquire no advantage or preference by being allowed to present his claim and thereafter foreclose his mortgage. Of course he cannot foreclose his mortgage after having presented his claim, if the encumbered property is sold by order of the probate court and the proceeds thereof are applied to the payment of the mortgage debt. In such a case he would have exhausted his security and could not pursue it any further.

We therefore conclude that the plaintiff was entitled to a

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decree foreclosing its mortgage, and the judgment of the lower court will be reversed. The cause is remanded with directions to the trial court to compute the amount due to the plaintiff on its mortgage, and to make findings of fact and conclusions of law in accordance with the facts proven upon the former trial and in harmony with the legal conclusions herein announced, and to enter judgment and decree in accordance therewith. Costs awarded to appellant.

Sullivan, C. J., concurs.

Stockslager, J., having heard the case at the first trial, took no part in the foregoing decision.

(June 24, 1904.)

BRANCA v. FERRIN.

[77 Pac. 636.]

ACTION TO QUIET TITLE—WHEN CANNOT BE MAINTAINED—ADMISSION OF RECORD OF FORECLOSURE PROCEEDINGS AS EVIDENCE, ERROR WHEN.

1. Where it is shown that the action is to quiet title to land which is a part of the public domain, that the plaintiff or his predecessor in interest have never occupied the land or filed a possessory claim to such land, as provided in section 4552, Revised Statutes, it cannot be maintained.

2. Where it is shown that the plaintiff in the action neither in person nor by his predecessor in interest ever filed a possessory claim on land to which he seeks to quiet the title, nor was never in possession thereof, it is error to admit the record of the foreclosure proceedings through which he claims title when the defendant is in the possession of the premises.

(Syllabus by the court.)

APPEAL from a judgment of the District Court of Custer County, and from an order overruling a motion for a new trial. Judgment reversed. Honorable James M. Stevens, Judge.

The facts are stated in the opinion.

Hawley, Puckett & Hawley, for Appellant.

It will be noticed from an examination of the complaint in this action that the plaintiff alleges title in fee to an undivided

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one-half interest in the land in question. As we take it, under such an allegation, in order for the plaintiff to prevail in this action he must show that he is the owner as alleged in his complaint, and unless he shows, as alleged in his complaint, that he is the owner in fee of such undivided one-half interest, we contend that he cannot recover in this action, as the defendants deny the ownership in fee of the plaintiff and set up by way of further answer and cross-complaint, the fact that the land is unsurveyed government land, which, if true, cannot be owned in fee; and immediately upon the fact being shown that the land in question is unsurveyed public land, the plaintiff must fail in his action. As we understand it, a title in fee is the largest estate which a person can have, and is an absolute, unqualified estate. If that be the law, an estate in fee to this particular property being in the government of the United States, the plaintiff has failed to substantiate his complaint, and he has no title whatever to the land or any portion thereof, it being a well-established rule of law that the plaintiff in an action to quiet title must first show title in himself. The only allegation of an adverse interest claimed by the defendants is as follows: "That the said plaintiff claims title in fee to the said premises, and that the said defendants, and each of them, claim an estate or interest therein adverse to the said plaintiff, as the plaintiff is informed and believes and therefore alleges." The allegation is not that the defendants claim some interest in the premises, but that the plaintiff is informed and believes that they do. This, we contend, is no statement of any cause of action. (*Pfister v. Dascey*, 65 Cal. 403, 4 Pac. 393.)

E. E. Chalmers for Respondent.

The object of an action to quiet title is to enable plaintiff to dispel whatever may be regarded, not only by the defendant, but also by third persons, as a cloud on his title, depreciating its value; and therefore, though a formal allegation of adverse claim may be necessary in the complaint under Code of Civil Procedure of California, section 738, providing that the action will lie to determine "adverse claims," it is immaterial whether or not defendant actually asserted such adverse claim

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before the commencement of the action. (*Bulwer Con. Min. Co. v. Standard Con. Min. Co.*, 83 Cal. 609, 23 Pac. 1102 (1108); 4 Notes on California Reports, p. 65.) Section 738, *supra*, is identical with section 4538, Idaho Revised Statutes. Nick Millick conveyed an undivided one-half interest in the property in question to Galacio, who in turn conveyed the same interest to the defendants. Plaintiff obtained his title and right to the other undivided half interest by the foreclosure proceedings. Thus the plaintiff and defendants became tenants in common of said premises. As between tenants in common and cotenants, there can be no adverse possession unless there has been an ouster by the party claiming adversely, and the possession of one is the possession of all. (Buswell on Limitations and Adverse Possession, secs. 296, 297; Tyler on Ejectment and Adverse Enjoyment, pp. 926, 927; 1 Cyc. of Law & Pr., pp. 1073, 1078; *Fry v. Payne*, 82 Va. 759, 1 S. E. 197; *Page v. Branch*, 97 N. C. 97, 2 Am. St. Rep. 281, 1 S. E. 625-627; *McCauley v. Harvey*, 49 Cal. 497.) The mere occupation of one is presumed to be not adverse to the other cotenant. (Buswell on Limitation and Adverse Possession, secs. 299, 300; Wood on Limitations of Actions, pp. 558, 559; 1 Cyc. of Law & Pr., pp. 1071, 1075; *Edwards v. Bishop*, 4 N. Y. 61; *Culver v. Rhodes*, 87 N. Y. 348.) Possession, payment of taxes, and appropriations of rents and profits do not necessarily amount to adverse possession. (1 Cyc. of Law & Pr., p. 1076.) The plaintiff has established a legal title (as against all persons except the United States government) to an undivided one-half interest in and to the premises in controversy, and is, therefore, presumed to have been possessed thereof within the time required by law, and the occupation of the property (i. e., an undivided half interest) by another person is deemed to have been under and in subordination to such legal title, unless it appear that the property has been held and possessed adversely to such legal title for five years before the commencement of the action. (Idaho Rev. Stats., sec. 4039; 3 Idaho Code, sec. 3120; *Martin v. Walker*, 68 Cal. 317, 9 Pac. 185.) To acquire and establish title by prescription, the claimant must show that his adverse holding was open, notorious and continuous. (*Mauldin*

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v. Cox, 67 Cal. 387, 7 Pac. 804; *Grayden v. Hurd*, 55 Fed. 724, 5 C. C. A. 258.) Under the defendants' plea of adverse possession, no evidence is admissible except the evidence of title and their deed was for an undivided one-half interest. (*Perkins v. Eaton*, 64 N. H. 359, 10 Atl. 704; *Greenhill v. Biggs*, 85 Ky. 155, 7 Am. St. Rep. 579, 2 S. W. 774.) No length of possession will give title in land to a party who only claims to own the improvements on said land. (*Davenport v. Sebring*, 52 Iowa, 364, 3 N. W. 403.) The possession of land, claiming only the improvements, and not the land itself, does not constitute adverse possession of the land. (*Brown v. Simpson*, 67 Tex. 25, 2 S. W. 644.) To effect ouster of cotenants, notice of adverse claim is required, or such possession that notice may fairly be presumed. (*Culver v. Rhodes*, 87 N. Y. 348; *Trenouth v. Gilbert*, 63 Cal. 407; *Bath v. Valdez*, 70 Cal. 350, 11 Pac. 724; Bailey on Onus Probandi, pp. 257, 258; *Dignan v. Nelson*, 26 Utah, 186, 72 Pac. 936; *Clymer v. Dawkins*, 3 How. 674, 11 L. ed. 778; *M'Clung v. Ross*, 5 Wheat. 116, 5 L. ed. 46; *Estate of Grider*, 81 Cal. 571, 22 Pac. 908; *Trenouth v. Gilbert*, 63 Cal. 404, 407; *Gage v. Downey*, 79 Cal. 140, 21 Pac. 527, 855; *Owen v. Morton*, 24 Cal. 373.) The tenant in common out of possession has a right to assume that the possession of his cotenant is his possession until informed to the contrary, either by express notice or by acts and declarations, which may possibly be equivalent to notice. (*Miller v. Myers*, 46 Cal. 535; *Aguirre v. Alexander*, 58 Cal. 217; *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100; *Bath v. Valdez*, 70 Cal. 350, 11 Pac. 724; *Carpenter v. Mendenhall*, 28 Cal. 484, 87 Am. Dec. 135; *McCauley v. Harvey*, 49 Cal. 497.) Under the circumstances of this case, mere possession and payment of taxes is insufficient to establish adverse possession of title or right thereby. The exclusive occupation of the whole tract, and cultivation of the same, and payment of taxes, by a tenant in common, are not of themselves sufficient to constitute an ouster of the cotenant. (*Packard v. Johnson*, 51 Cal. 545, cited *Phelan v. Smith*, 100 Cal. 167, 34 Pac. 667; *Packard v. Johnson*, 57 Cal. 180, cited *Oneto v. Restano*, 78 Cal. 376, 20 Pac. 743; *Gage v. Downey*, 79 Cal. 159, 21 Pac. 527, 855.)

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It does not appear that defendants were holding said premises under color of title or claim of right for the full period of five years or that the taxes assessed were actually paid by defendants. (Idaho Rev. Stats. 4040-4044.) It is contended by defendants that this, being unsurveyed public land of the United States, is not the subject of a suit to quiet the title thereto, and that the action cannot therefore be maintained. An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim. (Rev. Stats., sec. 4538; 3 Code, sec. 3379, and notes; *Fry v. Summers*, 4 Idaho, 424, 39 Pac. 1118.) An action to quiet title to lands is maintainable in this state, although the legal title thereto is in the government of the United States. (*Orr v. Stewart*, 67 Cal. 275, 7 Pac. 693.) Under the above section it is not essential that the complaint should aver the plaintiff to be the owner in fee; it will be sufficient if it appear that the plaintiff claims an interest in the land, and that the defendant asserts a claim of title adverse to the plaintiff's claim. (*Stoddart v. Burge*, 53 Cal. 394; *Rough v. Simmons* (Cal.), 3 Pac. 91; *Rough v. Booth* (Cal.), 3 Pac. 91.) The owner of an estate in lands less than a fee can maintain an action to determine an adverse claim made by another person. (*Pierce v. Felter*, 53 Cal. 18; *Wilson v. Madison*, 55 Cal. 5; *Craft v. Merrill*, 14 N. Y. 456; *Lounsbury v. Purdy*, 18 N. Y. 515; *Watson v. Sutro*, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64; *Tuffree v. Polhemus*, 108 Cal. 670, 41 Pac. 806; 2 *Estee's Pleadings*, 4th ed., sec. 2527.)

STOCKSLAGER, J.—The plaintiff commenced his action in the district court of Custer county, alleging that at the time of commencing his action he was, and for a long time had been, the owner, possessed and entitled to the possession of certain land situated in Custer county. Then after describing same property in the town of Bay Horse, we find this description of property: "And also that undivided one-half interest of, in and to that certain piece or parcel of land situate, lying and being at the mouth of Bay Horse creek, being inclosed by a fence, and known as the Calkins ranch or land claim, together with all improvements and appurtenances thereto be-

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longing, and all water and ditch rights therewith connected and heretofore used upon and for the same.”

The second allegation is that the said plaintiff claims title in fee to the said premises and that the said defendants, and each of them, claim an estate or interest therein, adverse to the said plaintiff, as the plaintiff is informed and believes and therefore alleges.

Third, the plaintiff alleges that the claim of the said defendants, and each of them, is without any right whatever. Then follows the prayer for relief in accordance with the above allegation.

Defendants answering deny each and all the allegations of the complaint and for a further answer and defense allege: 1. “That all the land and premises described in the complaint herein is vacant public land, and is unsurveyed; that on the twenty-second day of August, 1896, the defendants herein settled upon the premises described in the complaint herein as being inclosed by a fence at the mouth of Bay Horse creek, which said premises were at said time, and ever since have been, and now are, unsurveyed public lands belonging to the United States, and have ever since resided thereon; and have been in the actual and peaceable possession thereof, and entitled to the possession, and the owners thereof except as against the government of the United States, since said date.” The next allegation is: “That the defendants have been in the quiet and peaceable possession of the premises described in said complaint, holding and claiming the same adversely to the said plaintiff, and adversely to all other persons, except the government of the United States, for more than five years last past, and before the commencement of this suit, and that neither the plaintiff or ancestor, or predecessor or grantors, was or were possessed of the said lots of land, or either, or any portion thereof, within five years before the commencement of this action; and that the defendants have paid all the taxes that have been assessed against said premises.”

By way of cross-complaint defendants allege that they are now, and were at the commencement of this suit, and for more than five years before that time, and from thence up to that

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time had been, in the quiet and peaceable possession and occupancy of the land in controversy, together with all improvements and appurtenances thereto belonging, also water and ditch rights therewith connected, etc. That the said plaintiff has no right, title or interest, or right of possession, in or to the said described premises, or any part thereof; that the said plaintiff claims to have some right, title, interest, or right of possession, in or to the said described pieces and lots of land adverse to defendants, and claims that he is the owner thereof, and claims title thereto in fee.

Defendants allege that the said claim of plaintiff to said lots and pieces of land above described, whatever it may be as against the rights of these defendants, is without foundation, and is called upon for his title to said land and premises. Then follows prayer in compliance with the allegations above referred to.

The answer to the cross-complaint denies that the defendants were at the time of the commencement of the suit, or at any time or at all, in the quiet and peaceable possession of the premises in controversy; denies that the plaintiff has no right, title or interest or right of possession, etc.; denies that the said claim of plaintiff as against the right of defendants is or ever was without foundation, or ever was a cloud upon defendants' or either of their title or right in or to said land and premises, or that either of them has or had, immediately preceding the commencement of this action, any title or right whatever in or to said premises or any part or portion thereof, which is or ever was or could be the subject of, or cloud or encumbrance thereon.

Then for affirmative defense the plaintiff set up a judgment and decree of the district court of Custer county, by which it is shown that in an action of foreclosure then and there pending, in which the plaintiff and one John Millick, as administrator of the estate of Nick Millick, deceased, the predecessor in interest of the defendants herein, were defendants, and one Boas D. Pike, intervener, a judgment and decree of foreclosure and sale was given in favor of the plaintiff therein and herein and against the intervener therein, which decree, among other

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things, provided that the plaintiff had a prior and superior lien upon the premises involved in the action; that execution issued on said decree and was delivered to the sheriff of Custer County, who on the tenth day of September, 1900, sold said premises to the plaintiff in this action. That the sheriff issued to said purchaser a certificate of sale, etc.; that on the eleventh day of September, 1901, no redemption from said sale having been made, the sheriff executed and delivered to plaintiff a deed to the premises; that ever since that time plaintiff has been in the actual, continuous and peaceable possession of said premises, and the whole thereof, and has paid all taxes, state, county and municipal thereon.

These were the issues joined, and upon them the cause was tried by the court. Findings of fact and conclusions of law were filed and judgment entered accordingly.

The first finding is, "That the plaintiff is now, and for a long time heretofore has been, the owner, possessed and entitled to the possession . . . of that undivided one-half interest in and to that certain piece of land." Then follows the description of the land in controversy.

The third finding is, "That the claim of the defendants, and each of them, is without any right whatever, and that the said defendants, or either of them, have no right, title or interest whatever in and to said lands or premises, or any part or portion thereof, except said undivided one-half interest in said Calkins ranch."

It seems to be an undisputed fact that the land in controversy is unsurveyed public land, the plaintiff basing his right to recovery on his title from the sheriff of Custer county through a foreclosure proceeding and sale thereunder, and defendants basing their right to possession by virtue of a settlement which it is alleged was open, notorious and undisputed from the twenty-second day of August, 1896, and more than five years prior to the institution of this action. It being practically conceded that the property in dispute is a part of the public domain and also unsurveyed land, hence not subject to entry and sale, the important question arises as to who has been in possession and who was in possession at the time of the commencement of this suit.

Opinion of the Court—Stockslager, J.

It is conceded that the title to the property is in the government of the United States, and at most the only question that can be settled here is the right to possession. We will only examine the pleadings and evidence to determine this question. From the evidence it is shown that the defendants have been living in the house upon the premises in dispute since August, 1896. As we view it, it is unimportant, at this late date, how or under what circumstances they became possessed of the property; they were there beyond a question under color of right, and it is nowhere shown that they were placed in possession by the plaintiff or his grantor in the mortgage, or that they were the cotenants, partners or agents of Nick Millick, who, it is shown at one time was the owner of the improvements on the land and the party from whom plaintiff through his mortgage foreclosure proceedings obtained all the claim he has to the property. It is not shown that the plaintiff or his predecessor was ever in the actual possession of the property. It is alleged in the pleadings of the plaintiff that such was the fact, but he does not prove it. The only parties shown to have actually lived upon the premises were the defendants and one Sereaphiro Galacio, who sold his interest in the premises to the defendants, who immediately took possession and have resided there ever since. This transfer was made, as shown by the record, on the twenty-second day of August, 1896. We think the evidence establishes the fact that Nick Millick was at one time the owner of the improvements on the premises in controversy, and that he mortgaged a one-half interest to O. J. Salsbury, and thereafter mortgaged the same interest to the plaintiff herein for a sum sufficient to pay the Salsbury mortgage. Also that he sold the other half interest to Galacio, the party from whom the defendants claim to have obtained possession. These conclusions are supported by the evidence.

W. J. Treloar, a witness for the plaintiff, testified that he had known Nick Millick fifteen or sixteen years, that he resided in Bay Horse and was engaged in the hotel business and ranching; that he knew the ranch at the mouth of Bay Horse creek; sometimes called the Calkins ranch, and sometimes called the Millick ranch. Being asked if he ever knew Millick to live upon

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this piece of land, replied he never lived there that he knew of. He further testified that he knew both of the Ferrins. "They lived on this piece of land; they commenced living there five, six or seven years ago and have resided there continuously ever since; no one else lived there that I know of." The plaintiff testified that he resided in Bay Horse and had resided there eighteen years. This is all of the evidence of plaintiff with reference to the occupancy or possession of this land and the evidence of witness Treloar, taken in connection with the evidence of the defendant Ellen Ferrin, shows conclusively that the Ferrins have resided upon the land continuously since 1896. It is also shown that they have paid the taxes assessed against the property since 1899, and that the property was assessed in the name of Arthur Ferrin. It is not shown that the property was ever assessed as the property of plaintiff. We find in the record that certain ranch property was assessed as the property of plaintiff, but it is shown to have been a ranch about a mile below the town of Bay Horse, hence not this property. The assessment-roll of Custer county shows that the plaintiff paid taxes for the years 1899, 1900, 1901 and 1902 on a valuation of \$50 each year on a ranch about a mile below the town of Bay Horse formerly owned by Celestel Branca.

Counsel for respondent urges that the notice given by Arthur Ferrin and published in the "Challis Messenger" is conclusive that he did not claim this land by virtue of his settlement and occupancy thereof, it being unsurveyed public lands until after the date of such publication. The notice is as follows:

"To all whom it may concern:

"You are hereby notified to remove all improvements off the Millick and Ferrin ranch as provided by law and pay all claims against said improvements.

(Signed) "ARTHUR FERRIN.

"Dated March 6, 1901."

It is shown that the Ferrins had been residing upon these premises as the sole occupants for almost five years prior to the date of this notice; the only taxes ever shown to have been paid upon the premises were paid by the Ferrins. The notice was not

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directed to any particular person, simply a notice in effect that they claimed the right to possession, and if anyone claimed any of the improvements they must remove them after paying all claims against said improvements. If conclusions are to be drawn from this notice, they must be that Mr. Ferrin did not recognize anyone's right to occupy or possess any portion of the land in controversy, but that if anyone claimed any of the improvements, they might remove them by paying all claims against them.

A number of errors are assigned by appellant as to the admission of certain exhibits offered by the plaintiff; they were the records in the case of *Mal Branca* against John Millick, as administrator of the estate of Nick Millick, deceased, and Boaz D. Pike, intervener, wherein the plaintiff foreclosed a certain mortgage theretofore executed and delivered by Nick Millick to plaintiff, a part of the property described in said mortgage being the property in controversy here.

Millick could only mortgage the improvements on this land as the title then and now is in the government of the United States. We cannot see how this evidence could aid the plaintiff in a recovery in this action under the pleadings and evidence, as it was not shown that the plaintiff or his predecessor in interest ever filed a possessory claim to the property in dispute, or ever lived upon or occupied it, and he must have shown one or the other fact to exist before he could maintain an action of this character.

Other errors are assigned, but with our view of the case it is unnecessary to pass upon them, as the plaintiff is not entitled to the relief demanded in his complaint under the proof he has submitted. He asks for that which the court is powerless to give, and the judgment must be reversed and remanded to the lower court for further proceedings in harmony with the views herein expressed. Costs are awarded to the appellant.

Ailshie, J., concurs.

Sullivan, C. J., concurs.

Argument for Appellants.

(June 27, 1904.)

HESSE v. STRODE.

[77 Pac. 634.]

REAL ESTATE—TITLE BY ADVERSE POSSESSION—TAXATION BY CITY—ESTOPPEL.

1. Where the city erected a fire-engine house on its own lot and on a small fraction of an adjoining lot, and maintained such house there for about twenty years, and in the meantime assessed for taxation said fractional part of the adjoining lot with the remaining part thereof to the owner, and collected and received such taxes and charges for street paving, sidewalk, sprinkling and other city purposes, it is estopped from claiming title thereto by adverse possession.

(Syllabus by the court.)

APPEAL from the District Court of Ada County. Honorable George H. Stewart, Judge.

Action to quiet title to certain land. Judgment for defendants. Affirmed.

The facts are stated in the opinion.

Alfred A. Fraser and Charles M. Kahn, for Appellants.

Under the facts in this case as stipulated and agreed to, the plaintiffs herein base their right to recover upon two points: 1. That the city acquired title to said tract of land by adverse possession of the same; and 2. That the defendants are estopped to claim title to said tract of land in controversy by reason of the acquiescence of the defendants' predecessors in interest in the boundary line between said tracts of land by permitting, without objection, the city to erect the building upon the same and occupy the same without protest for a period of almost twenty years. On the question of adverse possession, the facts in this case establish all the elements necessary in such case, with the exception of the payment of taxes upon the property in dispute. The appellants contend that it was not necessary for the city to pay taxes upon this property in order to

Argument for Respondents.

acquire title by adverse possession, as the city, under the constitution and laws of the state of Idaho, is not required to pay taxes upon property. (Rev. Stats. 1887, sec. 1401; Idaho Const., art. 7, sec. 4; *United States v. Schwalby*, 8 Tex. Civ. App. 679, 29 S. W. 90; *Stanley v. Schwalby*, 147 U. S. 508, 18 Sup. Ct. Rep. 418, 37 L. ed. 259; *Grimm v. Curley*, 43 Cal. 250; *Brown v. Lette*, 2 Fed. 440, 6 Saw. 332.) It is held that acquiescence for a great number of years is conclusive evidence of an agreement to that line. No express agreement need be shown. (*Rockwell v. Adams*, 7 Cow. 761.) A line which parties have agreed to, either expressly or by acquiescence, will not be disturbed. (*McCormick v. Barnum*, 10 Wend. 105. See *Riley v. Griffin*, 16 Ga. 141, 60 Am. Dec. 726.) Standing by while a party subjected himself to expenses in regard to the land which he would not have done had not the line been located as it was, may perhaps warrant the presumption of a grant within the statute period. (*Adams v. Rockwell*, 16 Wend. 285, 302.) Acquiescence is conclusive evidence of an agreement as to a boundary, and such agreement need not be shown by direct evidence, but is inferred from conduct and such acquiescence. (*Turner v. Baker*, 64 Mo. 218, 27 Am. Rep. 226; *Baldwin v. Brown*, 16 N. Y. 359; *Jones v. Pashby*, 67 Mich. 459, 11 Am. St. Rep. 589, 35 N. W. 152; *Gwynn v. Schwartz*, 32 W. Va. 487, 9 S. E. 880; 4 Am. & Eng. Ency. of Law, 2d ed., 863; *O'Donnell v. Penney*, 17 R. I. 164, 20 Atl. 305; *Swettenham v. Leary*, 18 Hun, 284.)

W. E. Borah, for Respondents.

In the absence of the evidence of intention to hold adversely the presumption would be that he intended to hold to the true line. (*Tam v. Kellogg*, 49 Mo. 118.) "Occupation such as will constitute a disseisin of the true owner and give title by adverse possession must be accompanied with claim of title." This authority also lays down the rule that the burden is upon the plaintiff to establish every essential ingredient of his rights and that the presumptions are in favor of the true title. (*Alt-schul v. O'Neil*, 35 Or. 202, 58 Pac. 95.) Under the statutes

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of Idaho, adverse possession cannot ripen into title unless the party has paid all taxes assessed against the land according to law. (Idaho Rev. Stats., sec. 4043; *Green v. Christie*, 4 Idaho, 438, 40 Pac. 54.) In respect to the title to real estate, if the party claiming title is acquainted with the true state of the title or has an equal means with the other party of ascertaining it as in the case of a duly recorded deed, there will be no estoppel, at least from mere silence. (*Clark v. Parsons*, 69 N. H. 147, 76 Am. St. Rep. 157, 39 Atl. 899; *Odlin v. Gove*, 41 N. H. 465, 77 Am. Dec. 773; *Wood v. Griffin*, 46 N. H. 230; *Mountain Lake Co. v. Scharfzer*, 83 Md. 10, 34 Atl. 536; *Reynolds v. Insurance Co.*, 34 Md. 280, 6 Am. Rep. 337; *Jameson v. Rixey*, 94 Va. 342, 64 Am. St. Rep. 726, 26 S. E. 863; *Poynter v. Chapman*, 8 Utah, 442, 32 Pac. 693.) As to boundary line by acquiescence: *Biggins v. Champlin*, 59 Cal. 113; *Cooper v. Vierra*, 59 Cal. 282; *Sneed v. Osborn*, 25 Cal. 619; *McCormick v. Barnum*, 10 Wend. 104; *Jackson v. Van Corlaer*, 11 Johns. 123; *Perkins v. Gay*, 3 Serg. & R. 327, 7 Am. Dec. 653; *Moyle v. Connelly*, 50 Cal. 295; *City of Bloomington v. Bloomington etc. Assn.*, 126 Ill. 221, 18 N. E. 300; *Mullaney v. Duffy*, 145 Ill. 559, 33 N. E. 750; *Liverpool v. Prescott*, 7 Allen, 494; *Quick v. Nitschelm*, 139 Ill. 251, 28 N. E. 926-929; *Schraeder Co. v. Packer*, 129 U. S. 688, 9 Sup. Ct. Rep. 385, 32 L. ed. 760; *Watrous v. Morrison*, 33 Fla. 261, 39 Am. St. Rep. 139.

SULLIVAN, C. J.—This action was begun by Boise City, and thereafter the present appellants were substituted as plaintiffs. The action is to quiet title to a strip of ground two feet nine inches wide, off of the east side of the west half of lot 8, block 7 of the original townsite of Boise City. The case was tried upon an agreed statement of facts, and upon that statement the court rendered its decision in favor of the defendants who are the respondents here. The appeal is from the judgment. The following facts appear from the record: It was stipulated by the respective parties that the abstract of title marked exhibit "A" was a true and correct abstract of title to lot 8, block 7 of the original townsite of Boise City, and showing correctly the chain of title to said lot; that in the year

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1870 there was erected and has since been standing on the west half of said lot 8 a one-story brick or adobe building, and that said building was erected by the predecessors in interest of the respondents; that said building has been there ever since said year and is now standing thereon as the same was originally constructed; that there are two feet nine inches of the east side of the west half of said lot which are not covered or occupied by said building; that in the year 1884, Boise City erected upon the east half of said lot a city fire-engine house of brick, two stories in height, and that said house was erected over and upon the west half of said lot 8 to the extent of two feet, nine inches, and has remained so ever since, and so stands at the present time and has been occupied during said time by the city as a fire-engine house; that neither respondents nor their predecessors in interest have ever, at any time, objected or complained to the city authorities of Boise City as to the building or the erection of said city engine-house or as to the same being maintained thereon; that the respondents as heirs to John Strode, deceased, are now the owners and holders of all title and interest which said Strode had in the west half of said lot; that taxes, county, city and state have been legally levied and assessed each year upon and against the west half of said lot; that said levies and assessments were made, not against the entire lot, but against the west half of said lot separate and distinct from the east half thereof each year; that no part of said taxes so levied and assessed has, at any time, been paid by the appellants or their predecessors in interest, but that the respondents and their predecessors in interest have each year paid all of such taxes. That from time to time special assessments and expenses for sidewalks, street paving and sprinkling have been levied and assessed against and upon the west half of said lot, and that all such amounts so levied for such purposes have been paid by the respondents and their predecessors in interest. Upon those facts judgment was entered in favor of the respondents. The stipulated facts show that the respondents have a clear paper record title to the west half of said lot.

The questions for decision are: 1. Did the appellants and their grantor, the city, acquire title to said two feet and nine

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inches of land by adverse possession? Or 2. Was there a boundary line agreed upon? Or 3. Are the respondents estopped from questioning the title of the appellants? We will answer the second and third questions first.

The stipulated facts do not show that a boundary was ever agreed upon between the city and the owners of the west half of said lot, and there are no facts shown that estop the respondents from questioning the title of the appellants. The only other question for decision is: Did the city acquire title to the two feet, nine inches on the easterly side of said lot by adverse possession?

It is shown by the stipulated facts that Boise City levied taxes for city purposes and from time to time made special assessments for sidewalks, street paving and street sprinkling purposes upon the west half of said lot 8, and that all such amounts so levied, assessed or charged against said west half of lot 8 have been paid by the respondents and their predecessors in interest. This would indicate that the city was not holding said tract of ground adversely to the respondents, but recognized their title thereto by levying such taxes and charges against it. The city has thus from year to year treated this property as belonging to the respondents, accepted their money for the taxes so levied on the theory that the property belonged to them. And the city by those acts is estopped from denying that said property was legally assessed and that it was not, in fact, subject to taxation and did not belong to the respondents.

The judgment of the district court must therefore be affirmed, and it is so ordered. Costs of this appeal are awarded to the respondents.

Stockslager and Ailshie, JJ., concur.

Argument for Appellant.

(June 27, 1904.)

CORKER v. COMMISSIONERS OF ELMORE COUNTY.

[77 Pac. 633.]

ROAD DISTRICT CONTRACTS—CONTRACTOR—POWER OF COMMISSIONERS
TO RELEASE CONTRACTOR.

1. A board of county commissioners has neither express nor implied power to accept the resignation of a bidder to whom they have duly and regularly awarded a contract under section 875, Revised Statutes (Sess. Laws 1899, p. 129), for the care, keeping and repair of the roads of a contract road district.

2. It is to the interest of the county that such contracts be enforced. On the other hand, it is against the interest of the county for contractors to be released and relieved from their obligations. (Syllabus by the court.)

APPEAL from District Court in and for Elmore County.
Honorable Lyttleton Price, Judge.

From a judgment of the district court approving and affirming an order of the board of county commissioners, a citizen and taxpayer appeals. Reversed.

The facts are stated in the opinion.

W. C. Howie, for Appellant.

That the board has no powers but those directly conferred on it by statute and can act only in the manner laid down by statute has often been held by this court. (*Gorman v. County Commissioners*, 1 Idaho, 553, 556, 557; *Conger v. Board of Commrs.*, 5 Idaho, 347, 48 Pac. 1064, and many other cases.) And having exhausted their power by acting in the manner and to the extent as provided by law, they have no power afterward to set aside, annul or modify their action. (7 Am. & Eng. Ency. of Law, 1008, and notes; *Cowell v. Martin*, 43 Cal. 605; *Harris v. Board*, 49 Cal. 662; *Sturgeon v. Hampton*, 88 Mo. 203 (212-214); *Board of County Commrs. v. Logansport & R. C. R. R.*, 88 Ind. 199; *Doctor v. Hartman*, 74 Ind. 221; *People v. Supervisors of Schenectady Co.*, 35 Barb. 408; *Dorsey v. Barry*, 24 Cal. 449.)

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Daniel McLaughlin, for Respondent, files no brief.

AILSHIE, J.—On the nineteenth day of July, 1902, the board of commissioners of Elmore county duly and regularly let the contract to W. H. Davis for the keeping of the roads of contract road district No. 4 of Elmore county, in good repair as provided by law, for the term of two years from and after the twenty-ninth day of July, 1902. After the execution of the contract, and on the twenty-fifth day of July, the contractor made, executed and delivered to the board of commissioners his bond in due form conditioned for the faithful performance of his contract. At the July, 1903, meeting of the board of commissioners, the contractor, Davis, filed his written resignation as such contractor and asked the board to relieve him from his contract and discharge him from all liability thereon. The matter came on regularly for hearing on the twenty-first day of July, and, so far as the record shows, no evidence whatever was taken or heard by the board in the consideration of such resignation and application for discharge, and by a vote of two ayes and one nay, the board made and entered its order accepting the resignation. From the order so made and entered the appellant, C. E. Corker, a resident and taxpayer of Elmore county and road district No. 4 thereof, appealed to the district court. When the cause was called for trial in the district court, the appellant introduced the record of the proceedings of the board of commissioners in accepting the resignation, the contract entered into between the board and the contractor, and the bond given for the faithful performance of the terms of the contract. Thereupon the appellant offered to prove by his own testimony that the contractor had entirely failed to keep the roads of his district in repair and had neglected and failed to do any work thereon; that he had not lived up to the terms of his contract and had not complied with the requirements of law as to the duties of such contractor, and that by reason of his neglect to work and repair the roads and keep them in fair condition they had become impassable, and that at the time the board accepted his resignation it would have cost the county at least double the amount of the contract price to put the roads

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in a reasonable state of repair and condition for travel. After an extended statement by counsel for appellant as to the nature and character of the evidence he proposed to introduce by the witness, the court ruled upon the offer as follows: "The proffer of proof made by Mr. Howie is denied, for the reason that the court thinks it does not show an abuse of discretion on the part of the board in agreeing to terminate the contract in question; but that in that act they exercised a discretionary power which the law vests in them, and as far as the court can see, their act does not involve any abuse of that discretion, and for that reason the offer is denied." To this ruling appellant excepted and thereupon rested his case. No evidence was introduced by the respondents and the court rendered and entered his judgment approving and affirming the action of the board of commissioners. From this judgment the appellant has prosecuted this appeal. No appearance was made on the part of the respondents at the hearing in this court, but since that a brief has been filed by the county attorney on behalf of the board of commissioners. We have made a very careful examination of this question independent of the citations and authorities presented, in order to find, if possible, some authority directly in point, but our research has not been rewarded with any covering a similar state of facts. The authority for entering into such contracts as the one executed by the board in this case is found in sections 875, 876, 877, 878 and 879, as enacted and added to the Revised Statutes by act of February 7, 1899 (Sess. Laws 1899, pp. 127-132). Section 875 authorizes the execution of such a contract and provides that it shall not be entered into for a period "less than two, nor more than three years for the respective contract road districts." Section 876 prescribes the duties of such contractor in reference to keeping roads, bridges, etc., in good repair. Section 877 contains the only power and authority found in the statute for the board of commissioners enforcing the terms of the contract and compelling a compliance therewith. That section is as follows: "The board of county commissioners, upon learning that any of the public roads are not repaired and kept in good order by anyone contracting to do so in a contract road district, shall

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have power and shall cause the same to be done by placing labor thereon; and such expense shall be retained from any amount that may be due him on his contract, and should that be insufficient, or nothing be due thereon, the deficiency or whole amount (as the case may be) shall be collected from his bondsmen, as other liabilities." Section 878 provides for making quarterly payments to the contractor, and section 879 directs that the tax collector shall collect the road poll taxes for such district and turn the same in to the county treasurer. The contention of appellant is that the board of commissioners have no right or authority to terminate such a contract or accept the resignation of a contractor or discharge him from the obligations of his contract. It must be conceded that there is no express authority in the statute for any such action on the part of the board of county commissioners, and if the authority exists it is implied rather than express. This court has heretofore been inclined to confine the action of boards of county commissioners within the express power granted them by the statutes. (*Gorman v. County Commissioners*, 1 Idaho, 553; *Conger v. Board of County Commrs.*, 4 Idaho, 740, 48 Pac. 1064; *Howell v. Board of Commrs.*, 6 Idaho, 154, 53 Pac. 542; *Fremont County v. Brandon*, 6 Idaho, 482, 56 Pac. 264; *Hampton v. Board of Commrs.*, 4 Idaho, 646, 43 Pac. 324; *Meller v. Board of Commrs.*, 4 Idaho, 44, 35 Pac. 712.) We are of opinion, however, that in the discharge of the duties for which such boards are created, they should not only be allowed to exercise the powers expressly granted, but in addition thereto should be allowed the exercise of such implied powers as are necessary to the complete discharge of the duties imposed upon them by statute. Entertaining this view of the scope of their authority to act, the question arises: Is it necessary to the complete discharge of their duties in reference to contracting for the care and keeping of the roads in contract road districts, that they have authority to accept resignations from road contractors and terminate such contracts and relieve them from the obligations of their contracts? It seems to us that the answer to this question must inevitably be in the negative. The board of commissioners contract for and on behalf

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of the county. They are not the county but are rather its chief executive agents. The county can have no interest in relieving a contractor from his obligation. If the contractor has made a good bargain it is evident that he will never consent to a termination of the contract; if he has made a bad bargain, it is equally certain that the county, from a business point of view, is interested in enforcing that contract. So soon, however, as he finds he has entered into an unprofitable contract he is sure to bring all the pressure he can to bear upon the board of commissioners to have them relieve him from his obligation. In such a case, by underbidding others, he has possibly deprived the county of a more advantageous contract than it may thereafter be able to obtain. On the other hand, by the terms of section 877, *supra*, if the contractor fails to keep his obligation, the board is not authorized to terminate his contract, but rather to cause the work to be done and the roads to be kept in repair from time to time and to charge the same to the contractor and retain the expense thereof from any sum due him on his contract, and if there be not sufficient due for that purpose, to charge and collect the remainder from his bondsmen. It would appear, however, that the contract is still in force and effect and that its terms are enforceable by all the parties thereto. From the action of the board in awarding a contract any person aggrieved thereby, or any taxpayer of the county, may appeal to the district court (Sess. Laws 1899, p. 248), and if no appeal is taken within the statutory time the order is final and can no longer be questioned. The contract becomes an obligation from which the board cannot grant relief to the contractor or his bondsmen.

There is another consideration which leads us to believe that it was never intended that the board should have power to relieve a contractor from his obligation, and that is the provision of section 875, wherein it is enjoined upon the board that they cannot award such a contract for *less* than two years nor more than three years. Now, if they cannot award a contract for less than two years, and still by implication are permitted to release a contractor at any time, they would be doing by indirection what they cannot do directly and thus defeat

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the express terms of the statute. We do not think this can be done.

We conclude that the district judge should have reversed and vacated the order of the board of commissioners in accepting the resignation of the contractor. The order and judgment of the district court affirming such action is reversed and vacated and the cause is remanded, with direction to enter judgment in harmony with the views herein expressed. Costs awarded to appellant.

Sullivan, C. J., and Stockslager, J., concur.

(June 27, 1904.)

HAYS v. CRUTCHER.

[77 Pac. 620.]

APPEAL—EVIDENCE—STIPULATION OF ATTORNEYS—BILL OF EXCEPTIONS—STATEMENT.

1. Evidence contained in transcript and not saved by bill of exceptions or statement allowed by court or judge, cannot be considered on the appeal.

2. Under the following stipulation of counsel, to wit: "It is hereby stipulated between counsel for the respective parties in this case that the same shall be heard before the supreme court at the May term thereof upon this transcript, all questions of time of service being hereby waived," *held*, that the evidence contained in the transcript cannot be considered on the appeal, as it was not saved by bill of exceptions or statement settled by the judge.

(Syllabus by the court.)

APPEAL from the District Court of Ada County. Honorable George H. Stewart, Judge.

Action to recover an official bond. Nonsuit granted at close of plaintiff's evidence, and judgment entered dismissing the action. Judgment affirmed.

Opinion of the Court.

Jo. W. Huston, for Appellant, cites no authorities upon the point decided.

Hawley & Puckett, for Respondents.

What is before the court on this appeal? Counsel for appellant has in his brief argued the case upon the testimony, and the testimony is set forth in the transcript. (Folios 52-104.) This testimony, we urge, is not properly before the court and we have moved to strike it from the transcript. A compulsory judgment of nonsuit rendered on motion of defendant must be appealed from as a final judgment ending the suit. (2 Ency. of Pl. & Pr. 106.) Error in granting a nonsuit is error of law, and when it is excepted to and specified as such, may be reviewed on appeal, without any specifications of particulars wherein the evidence was insufficient. (*Hammond v. Wallace*, 85 Cal. 522, 20 Am. St. Rep. 239, 24 Pac. 837; *Schroeder v. Schmidt*, 74 Cal. 459, 16 Pac. 243; *Donahue v. Gullaven*, 43 Cal. 576; *Cravens v. Dewey*, 13 Cal. 42; *La Lande v. McDonald*, 2 Idaho (Hasb.), 307, 13 Pac. 347.) Upon an appeal from a final judgment the appellant must furnish the court with a copy of the notice of appeal, the judgment-roll and of any bill of exceptions or statement in the case upon which appellant relies. (Rev. Stats., sec. 4818.) To entitle a bill of exceptions to be considered in this court it must be settled and signed by the district judge. (*Meinert v. Snow*, 3 Idaho, 112, 27 Pac. 677.) All exceptions will be taken as waived unless the matters so excepted to are assigned as errors in this court. (*Purdy v. Steel*, 1 Idaho, 216.)

Per CURIAM.—This is an appeal from the judgment alone and under section 4818, Revised Statutes, brings up the judgment-roll and all bills of exceptions or any statement of the case upon which the appellant relies. The transcript in this case contains the pleadings, judgment and notice of appeal; also what purports to be a certified copy of the judgment-roll from the circuit court of the United States, within and for the district of Idaho, in the case of the *United States v. James I. Crutcher et al.*, and the motion made by the defendants in this

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case for a nonsuit. At the hearing in this case counsel for defendants moved to strike from the transcript all that portion of the transcript containing the judgment-roll from the United States circuit court. The motion is based upon the ground that this matter has no place in the transcript; that it is not incorporated in any bill of exceptions or statement, and that it cannot therefore be considered in this court. In reply thereto counsel for appellant relies upon a stipulation attached to the transcript which is as follows:

"It is hereby stipulated between counsel for the respective parties in this case that the same shall be heard before the supreme court at the May term thereof upon this transcript, all questions of time of service being hereby waived.

"May 6, 1904.

"JO. W. HUSTON,

"Attorney for Appellant.

"HAWLEY, PUCKETT & HAWLEY,

"Attorneys for Respondent."

It will be observed that this stipulation amounts to nothing more than an agreement that the case shall be heard at this present term upon the transcript to which such stipulation is attached. If it were contended that this stipulation takes the place of a certificate from the trial judge settling a bill of exceptions or statement, that contention would be fully met by *Meinart v. Snow*, 3 Idaho, 112, 27 Pac. 677, and *Van Meter v. Squibb*, 9 Idaho, 160, 72 Pac. 884. In the former case it was held by this court that a bill of exceptions cannot be considered on appeal unless it has been signed and certified by the trial judge. In the latter case it was held that the attorneys in the case cannot settle a statement on motion for a new trial by joining in a stipulation or certificate thereto, but that it must also be certified by the trial judge. In this case the judgment recites that, "Witnesses upon the part of the plaintiff were sworn and examined and documentary evidence introduced and plaintiff rested his case." Now, there is nothing in this record which shows or tends to show of what the documentary evidence introduced consisted nor what evidence was given by the wit-

Points decided.

nesses. It is not even shown by this record that the judgment-roll from the United States circuit court was introduced in evidence in the trial of this case. In short, there is no bill of exceptions or statement in the record. The motion to strike out what purports to be a certified copy of the judgment-roll commencing at the top of page 15 of the transcript and ending on page 29 thereof, is sustained. This leaves the case here upon the pleadings and judgment. The judgment is regular upon its face, and not being advised as to what was the class or character of evidence introduced by the plaintiff, we are not prepared to say that the trial court erred in granting the nonsuit. The judgment will therefore be affirmed, and it is so ordered. Costs are awarded to the respondents.

(June 28, 1904.)

PURDUM v. NEIL.

[77 Pac. 631.]

JUSTICE'S COURT—SERVICE OF SUMMONS OUTSIDE OF COUNTY—JURISDICTION.

1. Under subdivision 4 of section 4726, Revised Statutes, the objection that the action has been commenced in the wrong county may raise not only a question of law, but one of fact and entitle the defendant to a judgment of nonsuit after the evidence is in, although he does not defend against the action on its merits.

2. Where a defendant appears in a justice's court and makes and files his objections to the jurisdiction on the grounds that he resides and was served in another county, and that the contract sued on was not in writing and was not to be performed in the county where the action was commenced, and at the same time files his affidavit raising those issues and they are denied by the plaintiff's counter-affidavit and facts showing jurisdiction are set up in the counter-affidavit, the objections are properly overruled and the evidence should be heard.

3. If upon the trial it appears that the court has no jurisdiction of the person of the defendant, and of the contract sued on and objection be made on that ground, a nonsuit should be granted under section 4726, Revised Statutes.

(Syllabus by the court.)

Argument for Respondent.

APPEAL from the District Court of the Fourth Judicial District in and for Blaine County. Honorable Lyttleton Price, Judge.

From an order and judgment of the district court reversing a judgment of the justice's court of Hailey precinct, plaintiff appeals. Reversed.

The facts are stated in the opinion.

Sullivan & Sullivan, for Appellant.

The jurisdiction of a justice's court is sufficiently shown where it appears from the whole record in the proceedings. (*Sappington v. Lenz*, 53 Mo. App. 44; 12 Ency. of Pl. & Pr. 671; *Lowe v. Alexander*, 15 Cal. 297; *Fagg v. Clements*, 16 Cal. 389; *Jolley v. Foltz*, 34 Cal. 321.) Jurisdictional facts need not appear in declaration; it is sufficient if they appear on the trial. (*Hackman v. Flory*, 16 Pa. St. 196.) If jurisdictional facts nowhere appear in the records of the justice's court, and the judgment is attacked, the plaintiff could then introduce evidence *aliunde* in proof of the jurisdictional facts, in support of the judgment. (*Blair v. Hamilton*, 32 Cal. 50; *In re Madera Irr. Dist.*, 92 Cal. 335, 27 Am. St. Rep. 106, 28 Pac. 272, 675, 14 L. R. A. 755; *In re Williams*, 102 Cal. 70, 41 Am. St. Rep. 163, 36 Pac. 407.) Objection to the jurisdiction where the record does not show want of jurisdiction, should have been taken by answer at the trial. (*Small v. Guinn*, 6 Cal. 447; *Gregory v. Bovier*, 77 Cal. 121, 19 Pac. 232; *Holbrook v. Superior Court*, 106 Cal. 589, 39 Pac. 936.)

E. J. Dockery, for Respondent.

In an action on a judgment by default rendered in the justice's court the burden is upon the plaintiff to show affirmatively by competent evidence that the justice's court acquired jurisdiction to render the judgment sued upon. And a recital in the justice's docket not authorized by statute cannot establish jurisdiction over defendant to sustain a judgment rendered against him. (*Fisk v. Mitchell*, 124 Cal. 359, 57 Pac. 149;

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Kane v. Desmond, 63 Cal. 464.) The jurisdiction of justices' courts being special and limited, the law presumes nothing in favor of their jurisdiction, and a party who asserts a right under a judgment rendered in such court must show affirmatively every fact necessary to confer such jurisdiction. (*Rowley v. Howard*, 23 Cal. 401; *Lowe v. Alexander*, 15 Cal. 296; *Jolley v. Foltz*, 34 Cal. 321; *Mallett v. Uncle Sam M. Co.*, 1 Nev. 188, 90 Am. Dec. 484; *Woodbury v. Henningsen*, 11 Wash. 12, 39 Pac. 243.) Courts of justices of the peace, being of special and limited jurisdiction, can take nothing by intendment or implication. (*Paul v. Armstrong*, 1 Nev. 82; *Little v. Currie*, 5 Nev. 90; *McDonald v. Prescott*, 2 Nev. 109, 90 Am. Dec. 517.) Powers conferred on justices' courts must be strictly pursued and complete jurisdiction must be affirmatively shown. When a written notice is required to give jurisdiction, such notice must appear in the record to show the justice had jurisdiction; an entry in his docket will not be sufficient. (*Jones v. Justice Court*, 97 Cal. 523, 32 Pac. 575; *Eltzroth v. Ryan*, 89 Cal. 135, 26 Pac. 647.)

AILSHIE, J.—This action was originally commenced in Hailey precinct, Blaine county, and the complaint alleged that on the eighteenth day of February, 1901, plaintiff sold and delivered to the defendant a quantity of ice for which defendant promised and agreed to pay the sum of \$100, and that he thereafter neglected and refused to pay. In addition thereto it contains the following allegation: "That all the terms and conditions of said contract were to be performed in Blaine county, Idaho." Summons thereupon issued and was served upon the defendant in Boise City, Ada county. The summons was in substantial compliance with section 4655, Revised Statutes, but, like the complaint, made no mention as to whether or not the contract was in writing. On the day fixed in the summons for the appearance, the defendant filed his motion to dismiss the action upon the ground that he was a resident of Ada county, and that he had never been a resident of Blaine county, and on the further ground that the service of summons had not been made in the county of Blaine, but was made in

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Ada county, and that the court had obtained no jurisdiction over the person of the defendant. The motion closed as follows: "This motion is made upon affidavit hereto attached and the complaint, summons and return thereto in this action." So far as the transcript shows it does not appear that any affidavit was attached to the motion, but on the same day that the motion was filed, an independent document was also filed entitled in the cause which purported to be the affidavit of the defendant in which he denies all the allegations of the complaint and avers that he is a resident of Ada county, and that he never entered into a contract in writing with the plaintiff whereby he agreed to perform any obligation or pay any sum in the county of Blaine. Four days after the filing of this motion and affidavit the plaintiff filed what appears to be a counter-affidavit, wherein he alleges that the contract sued upon was a contract in writing wherein and whereby the defendant had promised to pay the plaintiff the sum of \$100 in Blaine county. The justice appears to have heard the defendant's motion on the same day on which the last-named affidavit was filed, and overruled the same. No further pleadings or papers were filed in the case, and thereafter, and on the first day of September, 1903, the case was called for trial and all parties appear to have been present. The plaintiff introduced his evidence and thereupon the defendant renewed his motion to dismiss on the ground of want of jurisdiction over the person of the defendant, and especially on the ground, "that the evidence in this case introduced by the plaintiff fails to show that the cause of action was brought upon a contract in writing, which by its terms was to be performed in the precinct of Hailey or in the county of Blaine, and that the summons shows that it was served outside of Blaine county." This motion was also overruled by the justice, judgment was entered in favor of the plaintiff, and the defendant thereupon appealed to the district court upon questions of both law and fact. When the case was called in the district court the defendant renewed his original motion made in the justice's court, which was sustained by the district judge and the judgment of the justice was thereupon reversed. From this judgment plaintiff has appealed. The

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contention of defendant both in the justices' and district courts was that since neither the complaint nor summons showed upon its face that the contract was a contract in writing to be performed in Blaine county, the justice had not therefore acquired jurisdiction to issue a summons to be served outside of the county.

By the terms of section 4639, Revised Statutes, "Actions in justices' courts must be commenced and subject to the right to change the place of trial (as in this chapter provided), must be tried: 7. When a person has contracted to perform an obligation at a particular place and resides in another county, precinct or city; in the precinct or city in which such obligation is to be performed or in which he resides."

Under section 4668, Revised Statutes, a complaint in a justice's court "is a concise statement in writing of the facts constituting the plaintiff's cause of action or a copy of the account, note, bill, bond or instrument upon which the action is based."

Section 4655, Revised Statutes, provides, among other things, that a summons from a justice's court shall contain "a sufficient statement of the cause of action in general terms, to apprise the defendant of the nature of the claim against him."

Section 4659, Revised Statutes, provides that "The summons cannot be served out of the county in which the action is brought, except when an action is brought against a party who has contracted in writing to perform an obligation at a particular place, and resides in a different county, in which case summons may be served in the county where he resides."

An examination of the foregoing statutory provision will disclose that the section providing the precinct or justice's court in which actions may be commenced authorizes an action to be instituted in the precinct where the obligation is to be performed, but does not require that obligation to be in writing. On the other hand; it is provided that a summons cannot be served out of the county in which the action is commenced unless the contract was in writing and to be performed in the county in which the action was begun. The respondent contends that this question of jurisdiction in such a case must appear from the record at the time the summons is issued and

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served. The appellant, on the other hand, argues that the statute nowhere requires these things to appear upon the complaint or summons or justice's docket, and that therefore if they exist as facts and appear upon the trial, that will be sufficient, and that the action cannot be defeated *in limine* by a motion to dismiss; that the case should be heard, and if upon the trial the want of jurisdiction appears, then the action will abate. A determination of that point is not essential to a decision of this appeal for the following reason: The defendant did not rest his motion upon the record made by the plaintiff—that is, he did not rest upon the fact that it nowhere appeared in the complaint, summons or upon the justice's docket that the contract sued upon was a contract in writing to be performed in Blaine county. He raised that issue himself by filing his affidavit alleging that he had never entered into any contract with the plaintiff to be performed in Blaine county. This raised an issue of fact on that point to which the plaintiff replied. Under those circumstances we think the justice properly overruled the motion.

It is evident from the record in this case and the proceedings had before the justice that both plaintiff and defendant, as well as the justice who heard the case, considered the issue that the action had been commenced in the wrong county had been properly raised, and that it remained an issue throughout the entire trial as contemplated by subdivision 4 of section 4726, Revised Statutes. After the court had ruled adversely to the defendant upon his original motion, he remained through the trial and at the close of plaintiff's evidence renewed his motion and based it upon the additional ground that the evidence in the case failed to show that the contract sued upon was in writing and to be performed in Blaine county. This question of jurisdiction could be kept good as a question of fact in this manner as well as it could be preserved as a question of law by an original motion to dismiss. Section 4726, Revised Statutes, is as follows: "Judgment that the action be dismissed without prejudice to a new action may be entered with costs, in the following cases: . . . 4. When it is objected at the trial, and appears by the evidence, that the action is brought in the

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wrong county, or precinct, or city; but if the objection is taken and overruled, it is cause only of reversal on appeal, and does not otherwise invalidate the judgment; if not taken at the trial it is waived."

A defendant might have no defense to an action upon its merits, and still the court have no jurisdiction of the defendant for the very reasons urged by the defendant in this case. In such case, however, he would not be required to defend upon the merits in order to save the objection, but might rely upon the question of jurisdiction both as a question of law and a question of fact; and this issue, while it would not defeat plaintiff's right of eventually recovering when he proceeds in the proper jurisdiction, still it would completely and effectually defeat the recovery in that particular action and within that jurisdiction. In the manner the question of jurisdiction was raised from the beginning in this case, it presented both an issue of fact and law rather than an issue of law alone. When presented to the district judge upon affidavits with discordant and conflicting evidence thereon, we think the motion should have been denied in the first instance and should have been determined upon the evidence in the case; and if it appeared therefrom that the action was commenced in the wrong county, the judgment of the justice's court should have thereupon been reversed; otherwise, plaintiff would have been entitled to recover.

The judgment of the district court is reversed and the cause remanded, with instructions to take further action in the case in harmony with the views herein expressed. Costs of this appeal awarded to appellant.

Stockslager, J., concurs.

Argument for Appellant.

(June 28, 1904.)

BEDAL v. SAKE.

[77 Pac. 638.]

DECREE OF DIVORCE—EFFECT ON COMMUNITY PROPERTY, WHEN RENDERED IN FOREIGN JURISDICTION.

1. Where the wife abandons her husband and home in the state of Idaho, takes up her residence in the state of Oregon, and thereafter procures a decree of divorce on service by publication, forms a new community by another marriage, eight years and more after abandoning her husband returns to Idaho and by an action in the name of herself and husband as coplaintiff with her, seeks to obtain her interest in the homestead of herself and former husband, *held*, that after forming a new community she abandons all claim on the old one and cannot recover.

2. One who voluntarily leaves this jurisdiction and the domicile and community property located in this state and obtains a decree of divorce in another jurisdiction, cannot maintain an independent action thereafter in this jurisdiction for a division of the community property.

(Syllabus by the court.)

APPEAL from the District Court of Ada County. Honorable George H. Stewart, Judge.

Action to recover community property. Demurrer interposed by defendant which was sustained. Judgment for respondent for costs. Judgment affirmed.

C. C. Cavanah, for Appellant.

The primary question involved in this case is whether either party to a decree of divorce may thereafter maintain an action for a partition of an undivided one-half interest in the real property acquired during their marriage when the pleadings and decree in said divorce proceedings did not refer to or determine any disposition of any property, and such decree was rendered in a state other than where such property is situated. We contend that such an action can be maintained, and the rule is now settled in *De Godey v. Godey*, 39 Cal. 157; *In re Burdick's Estate*, 112 Cal. 387, 44 Pac. 734-737; *Biggi v. Biggi*,

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98 Cal. 38, 32 Pac. 803; *Kirschner v. Dietrich*, 110 Cal. 502, 42 Pac. 1064; *Galland v. Galland*, 38 Cal. 271; *Lake v. Bender*, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74; *Weiss v. Bethel*, 8 Or. 526; *Whetstone v. Coffey*, 48 Tex. 269; *Colvin v. Reed*, 55 Pa. St. 375; *Reel v. Elder*, 62 Pa. St. 308, 1 Am. Rep. 414. The decree in the divorce suit could not operate as *res judicata* or be a bar to the recovery of an interest in the common property, unless it was made an issue and the court granting the divorce passed upon the question, and was within the state where the property is situated. (Greenleaf's Evidence, secs. 528, 529, 532; *Earl v. Bull*, 15 Cal. 421; *Minor v. Walter*, 17 Mass. 237.)

T. J. Jones and T. Cahalan, for Respondent.

The respondent contends that so far as the plaintiff's amended complaint shows, the plaintiff, Maggie Bedal, without cause or provocation, on the thirtieth day of January, 1895, abandoned the defendant and their family and their homestead and voluntarily placed herself beyond the jurisdiction of the courts of the state of Idaho and submitted herself to the jurisdiction of the courts of a foreign state (Oregon). The Oregon law reads as follows: "In a suit for the dissolution of the marriage contract the plaintiff therein must be an inhabitant of the state at the commencement of the suit, and for one year prior thereto, which residence shall be sufficient to give the court jurisdiction without regard to the place where the marriage was solemnized or the cause of suit arose." The above has been the law in Oregon since 1862, and is still the law. (1 Hill's Annotated Laws of Oregon, p. 454, sec. 497; 1 Bellinger & Cotton's Annotated Codes and Statutes of Oregon (1901), p. 277, sec. 509.) Where homestead rights exist the wife surrenders her interest therein by abandoning her husband and home without legal excuse. (*Farwell Brick Tile etc. Co. v. McKenna*, 86 Mich. 283, 48 N. W. 959; *Brady v. Kreuger*, 8 S. Dak. 464, 59 Am. St. Rep. 775, 66 N. W. 1083; *Rosholt v. Mehus*, 3 N. Dak. 513, 57 N. W. 783, 23 L. R. A. 239; *Wiggin v. Buzzell*, 58 N. H. 329; *Heaton v. Sawyer*, 60 Vt. 495, 15 Atl. 166; *Redfern v. Redfern*, 38 Ill. 509; *Dasel v. Coburn*, 6 Allen, 71; *Byers v. Byers*, 21 Iowa, 268; *Biffle v. Pullman*, 114 Mo. 50, 21 S. W. 250; *Barnett v. Barnett*,

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9 N. Mex. 205, 50 Pac. 340; *Roe v. Roe*, 52 Kan. 724, 39 Am. St. Rep. 367, 35 Pac. 808.)

STOCKSLAGER, J.—The plaintiffs filed their amended complaint, to which defendant demurred. The demurrer was sustained and plaintiffs refusing to further plead, judgment was ordered entered in favor of defendant for costs.

The amended complaint alleges that plaintiffs, Charles Bedal and Maggie Bedal, ever since the twentieth day of March, 1900, have been husband and wife; that the plaintiff, Maggie Bedal, and the defendant, Harry Sake, are the joint owners and tenants in common of eighty acres of land in Ada county; alleges the marriage of Maggie Bedal and Harry Sake in the state of Iowa in the year 1872, "and thereafter lived together as husband and wife until January, 1895; that in the month of March, 1899, said Maggie Bedal commenced a suit against said Harry Sake for a divorce in the circuit court of the state of Oregon, in the county of Clackamas, and in the month of May, 1899, a decree of divorce was duly allowed and entered, . . . and that said decree of divorce is now in full force and effect; . . . that no mention was made in said plaintiff's complaint for divorce of any property of any kind or description whatever, nor was any property rights of said parties mentioned in any of the proceedings, nor did said court adjudge or decree any property rights or give plaintiff any alimony, or require said Harry Sake to give or pay to plaintiff in that action any money or property. . . . The only effect of the decree being to dissolve the marriage relation. . . . That there never has been any settlement or agreement of any kind between said plaintiff, Maggie Bedal, and defendant, Harry Sake, of any property rights existing between them, nor has said plaintiff, Maggie Bedal, by any act on her part waived her interest in and to the aforesaid community property; that the said circuit court of Oregon had full jurisdiction at the time said divorce decree was rendered of the said parties and subject matter in said divorce proceedings; that in said divorce proceeding personal service was not had upon said defendant Harry Sake, but service was duly had by publication in compliance with the laws of the state of

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Oregon relative to service by publication in divorce proceedings; that at the date of said decree of divorce said plaintiff, Maggie Bedal, and said defendant, Harry Sake, were, now are, and ever since said date of said decree, joint owners and tenants in common of all of the aforesaid real property, and the whole thereof was acquired, purchased and taken up from the United States government with the efforts, labor and expense of both plaintiff, Maggie Bedal and defendant, Harry Sake, during the time they were living together as husband and wife; that on or about October 4, 1893, with the consent and request of said defendant, Harry Sake, said plaintiff, Maggie Bedal, filed for record a written declaration of homestead upon the aforesaid real property in recorder's office of Ada county; said declaration was duly signed and acknowledged by said Maggie Bedal in the name of Maggie Sake, who at the time was the lawful wife of said Harry Sake, and was living and residing upon said real property with said defendant as their home and place of residence."

The fourth allegation is that plaintiffs are informed and believe, and therefore allege, that Maggie Bedal is now the owner of and entitled to an undivided one-half part or interest in and to the aforesaid real estate, and that Harry Sake is now the owner also of an undivided one-half part or interest in said real estate; that defendant, Harry Sake, now is, and ever since on or about the thirtieth day of January, 1895, has been, in the possession of said property, and does, and has ever since said date, refused to allow said plaintiff, Maggie Bedal, to enter upon, take possession, occupy or use said real estate or any part thereof, although she has requested and demanded said defendant to allow her to use said real estate, and has asserted her rights to her interest in said property by claiming and notifying said defendant as to the same; that she has never made conveyance of her said interest in said property to anyone; that there are no liens or encumbrances on said property appearing of record or to the knowledge of plaintiffs, and that no persons other than the said plaintiff, Maggie Bedal, and said defendant are interested in said premises as owners or otherwise. That plaintiffs are informed and believe, and therefore allege, that said premises produce each year a crop of the value of \$500 net over

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and above all expenses necessary for maintaining said premises and the raising of said crop, and that said premises have produced said crops each year since on or about the thirtieth day of January, 1895. Then follows a prayer for judgment for a partition of the said real property according to the respective rights of the parties aforesaid; or if a partition cannot be had without material injury to those rights, then for a sale of said premises and a division of the proceeds. The demurrer to this complaint is on two grounds: "1. That the complaint does not state facts sufficient to constitute a cause of action. 2. That said complaint is ambiguous, unintelligible and uncertain in this: that paragraph 3 of said amended complaint, commencing at the word 'that' in the fourteenth line of said paragraph to and including the word 'Sake' in the thirtieth line of said paragraph is a single sentence in which no positive allegation of fact is made, in that several allegations are attempted to be made in said sentence, said allegations being connected with each other by the conjunctions 'or' and 'nor,' and that it does not appear therefrom what course or action was taken with reference to the matters and things therein referred to and as to what was, and was not, done with reference to the matters and things and by the parties therein referred to; and that it does not appear therefrom upon what theory the plaintiffs rely as to the matters and things therein stated; that in the fifth paragraph of said amended complaint in the ninth and tenth lines thereof that the following allegation, 'that said Maggie Bedal has never made a valid conveyance of her said interest in her said real property to anyone,' is ambiguous and uncertain in this: that the inference is that a conveyance of some kind or character was made by said alleged Maggie Bedal to some person or persons who may or may not have an interest in this litigation, and who may be proper and necessary parties either plaintiffs or defendants herein; and that said language implies that a conveyance was made by plaintiff, said alleged Maggie Bedal, either to this defendant or some other person or persons, leaving said allegation ambiguous and uncertain as to the intent and meaning of the plaintiffs."

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We have read the brief of counsel for appellant, together with the authorities cited with a great deal of interest and care. He insists that notwithstanding the fact that the plaintiff, Maggie Bedal, left her husband and home in Ada county, Idaho, in the month of January, 1895, went to the state of Oregon and in the month of May, 1899, obtained a decree of divorce from her husband and on the twentieth day of March, 1900, became the wife of her coplaintiff, Charles Bedal, that she is entitled to recover her interest in the property left in Idaho when she took up her residence in Oregon. The laws of Idaho deal very fairly with the wife in regard to community property. Certainly no fair-minded person would say that the wife should not share equally in the accumulation of a lifetime spent in the acquisition of property, and that is what our statute gives to the wife. Our divorce laws are certainly as liberal as could be desired. The grounds upon which a divorce may be granted in this state are as numerous as any of our sister states, hence under ordinary circumstances and conditions it is unnecessary for anyone to seek another forum in which to prosecute an action for divorce. The plaintiff in this action, for some reason best known to herself, saw fit to leave this state and prosecute her action in Oregon, certainly knowing that a division of the community property could not be decreed by the courts of that state on a service by publication. We are not informed by the complaint upon what ground or grounds she obtained her divorce, and it is immaterial and unimportant so far as her right to recover in this action is concerned. Suffice it to say, however, that it is hard to conceive of an excuse for her to leave this state or even Ada county, to prosecute her action. If her charge was extreme cruelty, or if she felt she was in danger of bodily harm from her husband, in case she commenced her action on a proper showing the court would have protected her from any danger from her husband and require the defendant to furnish her with means of support during the pendency of the action. On the final determination the court could, and certainly would, have rendered such a decree as to do equal justice to both parties to the controversy, thus ending the differences between them for all time. As we view it, it was the duty of the plain-

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tiff to commence her action in the jurisdiction where the property was situated, procure personal service on the defendant, and thus acquire jurisdiction of the property, and in the disposition of the case place the court in a position to settle the marital relations as well as their property rights. The plaintiff, Maggie Bedal, in this action does not enlighten the court as to her reason for seeking a dissolution of the marital relations in another forum, standing on the naked legal proposition that the property once held by reason of her marriage relations with defendant, it remained hers until she disposed of it or until five years after her decree was granted in Oregon, when it is practically conceded that the statute of limitations would run against an action of this character unless she asserted her right to her interest in the community property.

The questions presented to us by this appeal are new in this jurisdiction; we find no case either in territorial times or since statehood wherein these particular questions have been before this court. We have examined the authorities cited by appellant, and many others bearing on the questions involved, but find no one where the facts have been similar. In all our investigation we have been unable to find a case where the plaintiff left the home voluntarily and sought redress in another forum, procured a decree of divorce, took unto herself another husband, thereby dissolving the marital community of herself and her former husband, and creating a new one with her present husband, who is coplaintiff in this proceeding.

We are not prepared to say that if a personal service had been made on defendant in the state of Oregon, or if he had appeared and contested the action of his wife for divorce in that state, that that court would not have acquired jurisdiction of the community property in this state. But it is alleged in the complaint that the service was by publication, and is not alleged that the defendant appeared to contest the action, hence we conclude that court did not acquire jurisdiction of the community property. The statute of this state only gives the court power to dispose of community property after the divorce is granted; indeed, it acquires its power from this source alone. The husband controls the community property up until the very hour

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of the dissolution of the marriage relations. This being true, the question arises: How can the courts of this state acquire jurisdiction of what was community property at least up until the time the divorce was granted by the Oregon court, even though it be true that that court was not asked to, and made no attempt to, settle the property rights between the parties as husband and wife? It is presumed from the complaint, and the demurrer concedes it, that the plaintiff, Maggie Bedal, in this action, and Maggie Sake in that action, got all she asked for, which seemed to satisfy her until three years and more after she had assumed a new community and entered into a life contract with another husband. As we see it, the courts of this state are powerless to dispose of this property as community property under the existing circumstances. The courts of this state have not been called upon to dissolve the marital relations existing between Harry Sake and Maggie Sake, and if our conclusion is correct that our courts can only acquire jurisdiction in an action of this character, that is, for the purpose of disposing of the community property, by the entire divorce proceedings being before the courts of this state, then our courts are powerless to grant the relief demanded. We think our statutory provisions are in the interests of good morals and public policy and any other rule would be dangerous to the welfare of the citizens of our state.

The plaintiff, Maggie Bedal, says in her complaint that she has made frequent demands for the possession of and the right to occupy her interest in the property settled upon and improved by herself and former husband. She does not say when or how she made these demands, and counsel for respondent insist in their brief that the first information defendant had of her claims was when the summons was served upon him. We do not think this a matter of great importance only as it might show the good faith of the plaintiff, Maggie Bedal. Certain it is that she had lived separate and apart from her former husband almost nine years before she commenced this action, and we are not informed by the complaint why it was not commenced at an earlier date. It would seem that after she had lived away from her former husband and home for almost nine

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years, and had taken unto herself another husband who must necessarily have entered into a contract to support and protect her until death ended the contract, or another decree, and that three years and more had passed under this new contract, that the defendant had reason to believe that his "labor alone" on the eighty acres of land would be left to him and his children (if he had any) for his declining years. This would certainly be the equitable view to take of it. It may be that the husband was entirely to blame for the separation. We know nothing of this, or what their troubles were, but as we have heretofore said, the courts of this state were open to her and would have provided her with all the protection she needed, and required the defendant to support her and provide her with means with which to employ counsel and conduct her case through the court of last resort, if she desired to do so. It is a matter of common information, not only in this state but throughout the Union, that courts will always see that the wife is properly represented and protected in the trial of her case; and when the final decree is entered she usually has her full share of the property—if there is any.

We will now briefly review the authorities cited by appellant in support of his contention that under the complaint in this case the plaintiffs should recover in this action.

Counsel says: "The primary question involved in this case is whether either party to the decree of divorce may thereafter maintain an action for a partition of an undivided one-half interest in the real property acquired during their marriage when the pleadings and decree in said divorce proceedings did not refer to or determine any disposition of any property, and such decree was rendered in a state other than where such property is situated." This we conceive to be the important question, and the one upon which this case must be reviewed in the light of our statute.

The first authority to which our attention is called in support of this contention is *De Godey v. Godey*, 39 Cal. 157. The following facts are stated in the opinion: "It appears by the allegations of the bill that the parties were married in 1862, and that for some years thereafter, and up to May 20, 1869,

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they were lawful husband and wife. On the last-mentioned day the decree of divorce was entered, divorcing the parties, in the sixteenth judicial district court for the county of Kern. The appellant instituted the action in that court, though at the time of its commencement the parties in fact resided in the county of Santa Barbara, in the seventeenth judicial district. He fraudulently brought the respondent into Kern county, for the purpose of having the process served upon her, and the service having been effected, he misinformed her of the purport of the papers so served upon her, and with a view to conceal their true nature from her, he, as soon as the officer making the service had departed, violently took them from her possession and destroyed them. He thereafter returned the respondent to her home in Santa Barbara county, and there kept her restrained of her liberty and secluded from all intercourse with her friends, and in ignorance of the pendency of the action, and thereby deprived, of course, of any opportunity to make her defense, though she had a good one on the merits." Can it be seriously contended that the facts in this case have any bearing on the issues involved in the case at bar? It would have been a gross injustice to the wife to have permitted the husband to take the advantage of her in the manner there attempted and permit him to thus deprive her of her rights by fraud and deception. It will be observed, however, that the plaintiff in that action did not leave the state of California, in which both parties resided, to commence his suit for divorce, only into another county and judicial district of the state. He also procured personal service on the defendant, but destroyed it before she had an opportunity to inform herself of the nature and character of the action, and his every act was tainted with an attempt to defraud the defendant. He goes into another county of the state to commence his action and does not attempt to have the property rights settled. She commences her action at a later date and after she is informed of the nature of the decree in the former action to settle the property rights, and the court says she is not barred. What else could the court say under the facts in that case? She had not voluntarily had her day in court and had had no opportunity to litigate her rights; in

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other words, she had not prosecuted an action for a decree of divorce in another forum, and then come back to the home county she had voluntarily left, to prosecute another action in the name of herself and another husband for a division of the community property of herself and former husband.

Our attention is next called to the case of *In re Burdick's Estate*, 112 Cal. 387, 44 Pac. 734. The facts in this case have no relation to the case at bar, and it follows the case of *De Godey v. Godey* above referred to, and we are in full sympathy with the former case under the facts as therein related.

In the case of *Biggi v. Biggi*, 98 Cal. 35, 32 Pac. 803, Mr. Justice Harrison states the facts as follows: "The plaintiff was at one time the wife of the defendant Narcissa, and in October, 1888, pending an action between them for divorce, they entered into an agreement for the division of their property, in which it was provided that a lot of land situated on San Pablo avenue, in Oakland, should be sold, and the proceeds of the sale equally divided between them, but that such sale should not be for less than \$3,100, and that whenever offer should be made therefor one Vandercook should be the exclusive judge as to the value of said premises, and as to accepting or rejecting said offer, and that they would abide by his judgment and sell the premises for such sum as Vandercook might determine. This lot of land had been purchased during the marriage of the parties and the title thereto taken in the names of them both, but the judgment of divorce which was afterward rendered between them was silent upon the disposition of the community property. In June, 1899, Vandercook received an offer of \$3,200 for the property which he deemed sufficient therefor, and which the plaintiff agreed to accept, but the defendant, when requested thereto, refused to accept the offer, or sign a contract of sale unless he should receive the entire proceeds thereof."

The trial court held that the plaintiff had no interest in the land, which the supreme court said was error. Why not error? The parties to the divorce suit had agreed upon a settlement of this property as community property. The court had jurisdiction of the persons and property. They had entered into a solemn contract that the proceeds should be equally divided

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when the property should be sold, and the court of last resort said the contract should be enforced.

In *Galland v. Galland*, 38 Cal. 265, cited by appellant, Mr. Justice Crockett, speaking for the court, states the facts as follows: "The question presented on this appeal is, whether or not a wife, who, without cause or provocation, is driven from her husband's house with her infant child, and is wholly without the means of support, can maintain an action against the husband for a reasonable allowance for the maintenance of herself and child unless she couples with the application a prayer for a divorce."

The facts in this case certainly are not in harmony with the case presented to us by the complaint, which contains no allegation as to why she left her home in Idaho and went to Oregon to procure her divorce. In the California case just cited the complaint stated that "in the month of November, 1864, defendant, without cause or provocation, drove plaintiff from his house and ever has, and still does, refuse to live or cohabit with plaintiff, allow her to return to his house, or to speak to him."

It is true plaintiff alleges in her complaint that she has demanded possession of her portion of the real estate which was community property, and that the defendant refused to allow her to occupy it, but it is not shown when she made this demand, owing to the fact that she took up her residence in Oregon, procured her divorce there, and was married to her co-plaintiff, Charles Bedal, on the 20th of March, 1900. We assume that she did not make this demand until after she had formed a new community with her present husband. It is hardly fair to assume that defendant Sake would extend a very warm reception to the plaintiff, Maggie Bedal, or encourage her very much in her ambition to procure for herself and husband one-half of the property that he had been left to care for and improve during her absence in procuring a divorce and selection of another life companion.

In the case of *Lake v. Bender*, 18 Nev. 361, 4 Pac. 711, 7, Pac. 74, we find the facts to be stated as follows: "When the cause came on for trial it was agreed by the respective parties and ordered by the court that the issues relating to the disposition

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of the property should be withdrawn from the consideration of the jury and reserved for future consideration and determination by the court, in case a divorce should be granted. Upon the special findings and the verdict of the jury the divorce prayed for was granted. Subsequently, the court, sitting without a jury, tried the issues relating to the character and disposition of the property, and found that it belonged to the defendant individually." It does not seem that any judgment rendered under the above state of facts could in any way affect the case at bar. It is a very long, instructive case, with the authorities bearing on the issues presented, collated and commented upon, but we find nothing that enlightens us on the issues involved in the case we are considering, or that strengthens counsel in his position.

Again, in *Weiss v. Bethel*, 8 Or. 522, Mr. Justice Watson states the facts in this language: "This suit was originally commenced in the circuit court of Jackson county, but was afterward transferred to that of Benton county by an order of the court first named, upon written stipulation of parties. After the transfer plaintiff filed an amended complaint, by leave of court, and made several other parties defendants. Her amended complaint states in substance that she was married to defendant, Albert Bethel, in 1857, and lawfully obtained a divorce from him on the ground of desertion at the June term, 1866, of the circuit court of Jackson county; that at the time of the divorce the defendant Bethel was the owner of the Adam Holder donation land claim in Benton county, Oregon, containing three hundred and twenty acres; also of lots 1, 2, 3 and 4, block 3, of the city of Corvallis, in said county; that at the time she filed her complaint for divorce she was ignorant of the condition of said real estate; that said Bethel kept his business secret from her and led her to believe that he had sold or effectually encumbered it, so that at the time she did not know what disposition he had made of it." How can this case, under this statement of facts, have any bearing on the question at issue? The wife commenced her action in the jurisdiction where the defendant resided and the property was situated, but in her action for relief she pleads that by the fraudulent represen-

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tations of the defendant she was led to believe that the property was encumbered and that she could not reach it. No such charge is against the defendant in this action and no reason given for leaving the jurisdiction of the defendant and property to commence her action in another state.

In the case of *Whetstone v. Coffey*, 48 Tex. 269, the facts, as we gather them from the opinion, are that the plaintiff in that action lived with her husband upon three hundred and twenty acres of land, the right to which had been obtained under the pre-emption laws by Whetstone and his wife. The plaintiff in this case resided upon the land from 1850 to 1859; in 1859 the husband sold the land to Ben Vansickle without her consent being given to the said sale. The court says it was then community property of Anderson Whetstone and his wife, Margaret Whetstone. To show that she never parted with said right by abandonment or otherwise, she alleged that she was forced to leave her said homestead and follow her then husband and family; that he shortly thereafter abandoned her; that neither he nor she had any other homestead up to the time that a divorce was obtained in 1865; that she has never acquired one since. Under such a state of facts, it is not to be concluded that she had lost her right to the land up to the time of the decree of divorce by his abandonment of and separation from her. It is not shown here that the plaintiff who seeks to establish her right to her interest in the community property of her deceased husband, although she was divorced from him, sought such relief with her coplaintiff, her husband, at the time of the institution of the action; in other words, she had not formed a new community, but it was shown that all proceedings were in the state of Texas, both in the action for divorce as well as the one for her interest in the property. *Colvin v. Reed*, 55 Pa. St. 375, is cited by appellant. The statement in this case is that James and Susanna Taylor at the time of their marriage in May, 1857, were citizens of Pennsylvania. Shortly after their marriage they made a visit to Iowa and returned, Mrs. Taylor not being pleased with the country. After their return she declared to him her intention not to live with him and refunded to him \$40, his bill for the expenses of her jour-

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ney to Iowa. She remained in Allegheny City and he went back to Bedford county in October and remained there until May, 1858, when he sold his farm to the defendant and removed to Iowa, leaving his wife in Pennsylvania. In 1860 Taylor commenced proceedings for a divorce *a vinculo*, and after due publication of notice a divorce was decreed on the ground of the desertion, alleged to have taken place in Pennsylvania. Susanna Taylor had no actual notice, and at the time was a resident citizen of the state of Pennsylvania, never having left it. The question on this state of facts is whether the Iowa court had jurisdiction to declare the divorce of Mrs. Taylor so as to discharge the lands of her husband in Pennsylvania from her right of dower. In closing the court say: "These arguments have been noticed, and it has been shown, I think, that the principle finds limit, when confronted by the equal and prior right of another state and by the acts of a plaintiff who has abandoned his domicile and his remedy to take up a new domicile where the defendant has never appeared." Applying this rule to the case at bar, what standing has the plaintiff in this court? She voluntarily abandons her domicile and takes up her residence in another state, there procures her decree of divorce on a service by publication, the defendant not appearing to contest her action, then after a number of years and after her new contract of marriage, comes to the court that always had jurisdiction of the property, for relief.

In *Real v. Elder*, 62 Pa. St. 308, 1 Am. Rep. 414, cited by appellant, we find the following language in the syllabus: "The injured party in the marriage relation must seek redress in the forum of the defendant, unless where the defendant has removed from what was before the common domicile of both."

We scarcely feel justified in prolonging this discussion or reviewing the large number of authorities cited by learned counsel for respondent. It seems to us that the authorities we have heretofore copied from and discussed, precludes the appellant from a recovery in this action on the pleadings, at least as they now stand, and the plaintiff having dissolved the old community, if not by her Oregon divorce, by her new one formed in the

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marriage to her coplaintiff, precludes her from maintaining an action for the community property.

In *Heaton et al. v. Sawyer*, 60 Vt. 495, 15 Atl. 166, it was held that where the wife and children on the granting of the divorce moved from the premises and were absent two years, it was held to be an abandonment of the homestead. *Wiggin v. Buzzell*, 58 N. H. 329, holds that "A divorce obtained by a wife bars her homestead right in her husband's property unless such right is reserved by the decree of divorce." *Brady v. Kreuger*, 8 S. Dak. 464, 59 Am. St. Rep. 771, 66 N. W. 1083, holds: "Where the relation of husband and wife is terminated by divorce, she ceases to have any claim upon or right in his property, whether homestead or otherwise, unless such right is reserved to her by the decree of divorce. Whenever thereafter she seeks to assert any claim of any character in any part of the husband's property, she must establish her right by such decree or by valid contract between herself and him."

In *Rosholt v. Mehus*, 3 N. Dak. 513, 57 N. W. 783, 23 L. R. A. 239, a well considered and interesting case in which the authorities are collated and discussed by Chief Justice Bartholomew, he uses this significant language: "And it is true that courts liberally construe homestead laws for the purpose of effectuating their wise and beneficent intentions, to the end that no family, through the misfortune of poverty or the death of its legal head, may be deprived of shelter, and when the homestead consists of a farm, as in this case, of support. But all the reasons which have induced the law to favor the wife or widow in the matter of homestead rights are entirely absent in cases of divorce." (See *Doyle v. Coburn*, 6 Allen, 71.) *Barnett v. Barnett*, 9 N. Mex. 205, 50 Pac. 337, by Chief Justice Smith, is a very interesting one. We find this pertinent language used: "It is wisdom that forbids the multiplication of litigation on the same subject and spares suitors needless vexation in the determination of their rights. The parties to this controversy, having been separated by final decree of a court of competent jurisdiction, are estopped from further harassing each other as consorts in another tribunal."

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A great many other authorities are cited by counsel for respondent supporting those already referred to in this opinion, but we do not feel called upon to pursue this discussion further. The plaintiff, Maggie Bedal, voluntarily abandoned her home and obtained her decree of divorce in a forum without jurisdiction to dispose of the community property—being service by publication—thereafter marries another and then forms a new community, she will have to look to her present community for her future support and happiness. We do not think she should enjoy the fruits of her new community and have a pension from her former one.

The judgment of the district court is affirmed, with costs to respondent.

Ailshie, J., concurs.

SULLIVAN, C. J., Dissenting.—I am unable to concur in the conclusion reached by the majority of the court. Section 2480, Revised Statutes, provides how community and homestead property shall be disposed of in case of divorce, and is as follows: "In case of the dissolution of the marriage by the decree of a court of competent jurisdiction, the community property and the homestead must be assigned as follows: 1. If the decree be rendered on the ground of adultery or extreme cruelty, the community property must be assigned to the respective parties in such proportions as the court, from all the facts of the case and the conditions of the parties, deems just; 2. If the decree be rendered on any other ground than that of adultery or extreme cruelty, the community property must be equally divided between the parties; 3. If a homestead has been selected from the community property, it may be assigned to the innocent party, either absolutely or for a limited period, subject, in the latter case, to the future disposition of the court; or it may be divided or be sold and the proceeds divided; 4. If a homestead has been selected from the separate property of either, it must be assigned to the former owner of such property, subject to the power of the court to assign it for a limited period to the innocent party."

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In the case at bar it is alleged in the complaint that the property involved is community property acquired by the joint efforts of both husband and wife and thereafter was homesteaded under the laws of this state by the wife. While it does not appear on what grounds the wife obtained the divorce in the Oregon court, the presumption is that it was on sufficient ground and that the husband was in fault. If it was obtained on any other ground than that of adultery or extreme cruelty and had been obtained in a competent court of the state of Idaho, said section of the statute provides that the community property must be equally divided between the parties; and in other cases it must be divided as the court, from all the facts of the case and condition of the parties, deems just. And I do not think the fact that the divorce was obtained in the state of Oregon is a sufficient reason for depriving the wife of a part of the property that she had helped to accumulate. A court of equity would have power to do justice between the parties after the evidence was introduced on the trial, and if it showed the wife was entitled to receive a portion of the property that she assisted in accumulating, she certainly ought to have it.

The plaintiff in this action had filed a declaration of homestead on the land in controversy, and section 3041, Revised Statutes, declares that a homestead can be abandoned only by a declaration of abandonment or a grant of conveyance thereof, executed and acknowledged as therein specified.

The question of an innocent purchaser of said property, for a value, without notice, is not involved in this case. I think the allegations of the complaint state a cause of action, and the demurrer should have been overruled.

Argument for Petitioner.

(June 29, 1904.)

IN RE D. C. ABEL.

[77 Pac. 621.]

LICENSE TAX—RESTRAINT OF TRADE—INTERSTATE COMMERCE—CONSTITUTIONAL LAW.

1. Under the provisions of an act providing for the licensing of peddlers, hawkers and solicitors and prescribing penalty for failure to comply with the provisions of said act, approved March 16, 1901 (Sess. Laws 1901, p. 155), an agent or solicitor for a wholesale merchant, which agent has the goods which he is selling in this state, is required to pay the license tax provided by said act before he can legally do business in this state.

2. The phrase "taking orders," as used in the eighth section of said act, does not contemplate that the runner shall have the goods with him at the time of the sale, but in the common acceptance of the phrase, the agent or runner sells the goods by sample, taking orders therefor, and thereafter delivers the goods.

3. That part of section 8 of said act, by which it is sought to confine the taking of orders for goods sold to merchants only, is clear legislation and in contravention of both federal and state constitutions, but as the remaining part of said act is capable of being enforced in accordance with the legislative intent wholly independent of that provision, that provision is rejected therefrom and the remaining part thereof permitted to stand.

4. That provision of said section 8 referring to peddlers and hawkers in farm products applies to farm products of other states as well as those of the state of Idaho, and is not class legislation, and in no manner interferes with interstate commerce.

5. Internal and domestic commerce are subject to the taxing and police power of the state.

(Syllabus by the court.)

ORIGINAL application for a writ of *habeas corpus*. Writ denied.

The facts are stated in the opinion.

Forney & Moore, for Petitioner.

This law is class legislation; it grants special immunities to special classes; it violates the rule of equality before the law; it violates section 19, article 3 of the constitution of Idaho; and

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also section 5 of article 7 of the constitution of the state of Idaho. (*Brooks v. Hyde*, 37 Cal. 366, 375; *Ex parte Yale*, 24 Cal. 241, 85 Am. Dec. 62; *Youngs v. Hall*, 9 Nev. 218; *Cohen v. Wright*, 22 Cal. 293; *Ex parte Jentzsch*, 112 Cal. 468, 44 Pac. 803, 32 L. R. A. 664; *Van Harlingen v. Doyle*, 134 Cal. 53, 66 Pac. 45, 54 L. R. A. 771.) It is one of the highest privileges of the citizen that he may engage in legitimate business on equal terms, the same terms granted to all citizens. (Cooley's Constitutional Limitations, 4th ed., p. 393.) It is further contended that the law in question is in violation of section 2 of article 4 of the constitution of the United States, and of section 1 of the fourteenth amendment of the constitution of the United States. (*Union Sewer Co. v. Connally*, 99 Fed. 354; *Brown v. Jacobs Pharmacy*, 115 Ga. 429, 90 Am. St. Rep. 126, 41 S. E. 553, 57 L. R. A. 547; *State v. Waters Pierce Oil Co.* (Tex. Civ. App.), 67 S. W. 1057; *State v. Garbroski*, 111 Iowa, 496, 82 Am. St. Rep. 524, 82 N. W. 959, 56 L. R. A. 570; *In re Langford*, 57 Fed. 570; *Ex parte Westfield*, 55 Cal. 550, 36 Am. Rep. 47; *State ex rel. Garrabad v. Dering*, 84 Wis. 585, 54 N. W. 1104, 19 L. R. A. 858; *Pasadena v. Stimpson*, 91 Cal. 238, 27 Pac. 604; *Steed v. Harvey*, 18 Utah, 367, 72 Am. St. Rep. 789, 54 Pac. 1011; *Apex etc. Co. v. Garbade*, 32 Or. 582, 52 Pac. 573, 54 Pac. 367, 382.) In the case of *Chilvers v. People*, 11 Mich. 43, the court says the object of a license is to confer a right that does not exist without a license. A mere tax imposed upon a business or occupation, therefore, is not a license unless the license confers a right or privilege as to the business which would not otherwise exist. (Cooley's Constitutional Limitations, 4th ed., 242, 393; Tiedeman's Limitation of Police Power, 278.) A very interesting discussion of this subject has recently been made by Judge Bartsch of the supreme court of Utah, in *Cache County v. Jensen*, 21 Utah, 207, 61 Pac. 303; *State v. Hinman*, 65 N. H. 103, 18 Atl. 194, 23 Am. St. Rep. 22, and note. This is the third brief filed by petitioner in this case. In order that the court may be as fully advised as possible as to the position of the petitioner, we have taken the liberty of citing these additional authorities: *Simrall v. City of Covington*, 90 Ky. 444, 29 Am. St. Rep. 398; *Sayre Borough v. Phillips*, 148 Pa. St. 482, 33 Am.

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St. Rep. 843; *Chaddock v. Day*, 75 Mich. 527, 13 Am. St. Rep. 468; *Nichols v. Walters*, 37 Minn. 264, 33 N. W. 800; *State v. Hammer*, 42 N. J. L. 435.

Attorney General Bagley, for the State, files no brief.

SULLIVAN, C. J.—This is an original application to this court for a writ of *habeas corpus* and involves the constitutionality of an act approved the 16th of March, 1901. (Sixth Sess. Laws, p. 155.) The following facts appear from the record: That the petitioner is a resident of the state of Iowa and was, at the time of his arrest, an agent of Mason & Abel, wholesale merchants of St. Louis, Missouri; that the said Abel was traveling through Latah county as such agent and solicitor and selling buggies at retail to various people in Latah county at the time of his arrest. He was brought before the court on complaint of the district attorney of Latah county and fined, and is now serving a term of imprisonment in the county jail in default of the payment of said fine. The case was submitted to the trial court on an agreed statement of facts, which statement contains the following: That the petitioner was the agent and solicitor of the firm above named, which firm is the manufacturer and wholesale dealer of buggies; that the petitioner was the duly authorized agent and solicitor of said firm for buggies in the state of Idaho, and as such agent and solicitor he engaged in the business of selling and offering to sell buggies in the state of Idaho, by delivering to the purchaser at the time of sale the buggies so sold, and that on the thirteenth day of May, 1904, in said county, the petitioner sold to one Charles Hobart, and delivered the same to him, a certain buggy belonging to said firm; that neither the petitioner nor said firm at the time of such sale had procured a license from the county auditor of said county before engaging in said business and making said sale, as required by the above-mentioned law. It is further agreed that prior to the commencement of this action the board of county commissioners of said county fixed the license under said act as follows: Peddlers or hawkers on foot, \$25 per year; peddlers or hawkers with wagon, \$50 per year.

Section 1 of said act makes it unlawful to peddle without a license. Section 2 provides that every peddler or hawker, trav-

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eling with a pack and on foot, shall pay a license of not less than \$25 nor more than \$50 per year. Section 3 provides that every peddler or hawker, traveling with a wagon or other vehicle, shall pay a license of not less than \$50 nor more than \$100 per year. Section 4 provides that every peddler or solicitor taking orders for groceries, clothing, hardware, or other mercantile establishments shall pay a license of not less than \$75 nor more than \$125 per year. Section 5 provides that the money so received for licenses shall be turned into the general fund of the county. Section 6 provides that every peddler or hawker shall be compelled to exhibit his license when called upon by any party to whom he is endeavoring to make a sale of goods. Section 7 provides that no license shall continue for a less period than one year. Section 8 is as follows: "The provisions of this act shall not be construed to apply to runners traveling for wholesale houses and taking orders from merchants only, nor to peddlers or hawkers in farm products." Section 9 provides the penalty for the violation of the provisions of said act. Section 10 makes it the duty of the county commissioners to fix the amount of such license, and provides that the county auditor shall issue such licenses upon payment of the prescribed fee.

It is first contended by counsel for the petitioner that under the provisions of said section 8, that hawkers or peddlers traveling for wholesale houses may take their goods with them, take orders from merchants, and deliver the goods sold to the merchants at the time of the purchase, and that hawkers and peddlers of farm products may sell indiscriminately both to merchants and others, and contend that said law was enacted for the benefit of wholesale houses and for the benefit of merchants only, in that it permits them to buy from peddlers or hawkers whatever goods they may wish and have them delivered at the time of the purchase, while it prevents every person not a merchant from purchasing from such peddler or hawker and receiving his goods at the time of the purchase. We cannot agree with these contentions of counsel. Said section does not authorize the runners or drummers traveling for a wholesale house to carry the goods to be sold with them. The phrase "taking orders," as used in said section, does not contemplate that the

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runner shall have the goods with him at the time of the sale and deliver them; that would be a sale and delivery of the goods if that were done, and not taking orders for goods. The legislature has not the power to restrict drummers and runners traveling for wholesale houses from taking orders from people generally, and they cannot by legislation confine the taking of orders to merchants only, as that would be class legislation. And that part of said section, whereby it is attempted to confine the taking of orders for merchandise to merchants only, is unconstitutional and clearly class legislation. But that objectionable feature of said section does not render the whole act unconstitutional and void, as the remaining part of the act is capable of being executed in accordance with the apparent legislative intent wholly independent of that portion attempting to confine the taking of orders to merchants only; the invalid part may be rejected and the valid portion permitted to stand, as we think the legislature would have passed the law regardless of the invalid part thereof. The provisions of said section except from the operation of said act peddlers and hawkers in farm products. That applies, of course, to the farm products of other states as well as those of the state of Idaho, and is not class legislation within the meaning of that term and is not repugnant to the provisions of our constitution, and in no manner interferes with interstate commerce.

Under the stipulated facts it appears that the petitioner takes his buggies with him and travels around among the farmers, and when he sells one he thereupon delivers it to the purchaser. It will be observed that the property at the time of the sale was within the state and under the control of the agent.

This court held in *Re Kinyon*, 9 Idaho, 642, 75 Pac. 268, that where both the property and the business or occupation are within the jurisdiction of the state, they are subject to its regulation and control, and that any transaction with reference thereto does not look to interstate commerce for carrying out the execution of the contract. This principle was announced and distinction made in *Emert v. State*, 156 U. S. 296, 15 Sup. Ct. Rep. 367, 39 L. ed. 430, where Mr. Justice Gray said: "The defendant's occupation was offering for sale and selling sewing-machines by go-

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ing from place to place in the state of Missouri, in a wagon, without a license. There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time. His dealings were neither accompanied nor followed by any transfer of goods, or of any order for their transfer, from one state to another, and were neither interstate commerce in themselves nor were they in any way directly connected with such commerce. The only business or commerce in which he was engaged was internal and domestic; and so far as appears, the only goods in which he was dealing had become part of the mass of property within the state. Both the occupation and the goods, therefore, were subject to the taxing power and the police power of the state. . . . The necessary conclusion, upon authority as well as upon principle, is that the statute of Missouri now in question is in no wise repugnant to the power of Congress to regulate commerce among the several states, but is a valid exercise of the power of the state over persons and business within its borders."

The only business or commerce in which the petitioner was engaged was internal and domestic, and the vehicles which he was selling had become part of the mass of property within the state. Both the occupation and the property were, therefore, subject to the taxing power and to the police power of the state, and the licensing of that business was a valid exercise of the legislative power of the state over such business and persons engaging therein.

The writ must be denied, and it is so ordered.

Stockslager and Ailshie, J. J., concur.

Argument for Plaintiff.

(July 1, 1904.)

IDAHO MUTUAL CO-OPERATIVE INSURANCE COMPANY v. MYER, INSURANCE COMMISSIONER.

[77 Pac. 628.]

STATUTORY CONSTRUCTION—LOCAL LAW.

1. Statutes will be construed with a view to ascertain the intent of the law-making power and to give force and meaning to the language used.

2. A statute that deals exclusively with one subject and repeals all acts and parts of acts in conflict with it will be construed to have been intended to cover all subjects and matters of the new act.

3. The legislature may enact a law relative to one class of insurance so long as it is general in its terms as to that particular class of business.

(Syllabus by the court.)

ORIGINAL action in this court. Application for a writ of mandate. Writ granted.

Davidson & Hutchinson, Good & Roberts and H. J. Jones, for Plaintiff.

The fact that an act classifies persons who may form a corporation, or the purposes for which corporations may be formed, or the corporations which shall enjoy powers or privileges granted, does not render it a special act, if the classification is reasonable, and if the act applies to all persons or corporations falling within the particular classes. (1 Clark & Marshall on Private Corporations, pp. 105, 106; *Attorney General v. McArthur*, 38 Mich. 204; *In re New York Elevated R. Co.*, 70 N. Y. 327; *Hazelett v. Butler University*, 84 Ind. 230; *City of Indianapolis v. Navin*, 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, 41 L. R. A. 337; *Atlantic City Water Works Co. v. Consumers' Water Co.*, 44 N. J. Eq. 427, 15 Atl. 581; 23 Am. & Eng. Ency. of Law, 1st ed., 149; *Edmonds v. Herbrandson*, 2 N. Dak. 270, 50 N. W. 970, 14 L. R. A. 725; *Bray v. Hudson Co.*, 50 N. J. L. 82, 11 Atl. 135; *Davis v. Clark*, 106 Pa. St. 377; *Van Riper v. Parsons*, 40 N. J. L. 1.) When a corpora-

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tion is organized under a general corporation law authorizing the formation of such corporation, its charter consists of the law under which it is organized, and the articles or certificate of association or incorporation adopted or issued in pursuance of the law, in so far as they are in compliance with and authorized by the law. (1 Clark & Marshall on Private Corporations, p. 375; *Granger's Life etc. Ins. Co. v. Kamper*, 73 Ala. 325; *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 319, 22 N. E. 798; 8 L. R. A. 497; *Chicago Municipal G. L. & F. v. Town of Lake*, 130 Ill. 42, 22 N. E. 616; *Van Etton v. Eaton*, 19 Mich. 187; *Taggart v. Perkins*, 73 Mich. 303, 41 N. W. 426; *State v. Central Iowa R. Co.*, 71 Iowa, 410, 60 Am. Rep. 806, 32 N. W. 409; *Abbott v. Omaha S. & R. Co.*, 4 Neb. 416; *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb. 279, 62 N. W. 480; *Society etc. v. Commonwealth*, 52 Pa. St. 125, 91 Am. Dec. 139; *Knights of Pythias v. Weller*, 93 Va. 605, 25 S. E. 891; *Gould v. Fuller*, 79 Minn. 414, 82 N. W. 673; *Groin v. Potter's Co-op. Co.*, 29 Wkly. Law Bul. (Ohio) 52.) The question for the court is, What did the legislature really intend to direct? And this intention must be sought in the whole act taken together, and other acts *in pari materia*. (Sutherland on Statutory Construction, secs. 260, 286, 287.)

John A. Bagley, Attorney General, for Defendant, cites no authorities on question decided.

STOCKSLAGER, J.—This is an original proceeding in this court to determine the right of plaintiff to conduct its business in this state without paying the annual license and taxes as provided by the Session Laws of 1901. The hearing was on a demurrer. We find the following headlines for chapter 2 of that act:

“General Provisions Dealing Entirely With Insurance Companies Other Than Fraternal Beneficiary Societies.

“Sec. 1. It shall not be lawful for any person to act within this state as an agent or otherwise in soliciting or receiving applications for insurance of any kind whatever or in any manner to aid in the transaction of the business of any insurance company incorporated in this state, or out of it, without first pro-

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curing a certificate of authority from the insurance commissioner.

"Sec. 2. It shall be the duty of the president, or the vice-president and secretary of every insurance company doing business in this state, annually, on or before the first day of April of each year, to prepare, under oath, and deposit with the insurance commissioner of this state a full, true and complete statement of the condition of said company on the last day of the month of December preceding."

Section 3 provides that the annual statement shall contain: "1. The name of the company and where located. 2. The names and residences of the officers of said company doing business in the state. 3. The amount of the capital stock or assets of the company. 4. The amount of capital stock paid up. 5. The property or assets held by the company, viz.: The real estate owned by such company; the amount of cash on hand and deposited in banks to the credit of the company; the amount of cash in hands of agents; the amount of cash in course of transmission; the amount of loans secured by first mortgage on real estate, with the rate of interest thereon; the amount of all bonds and other loans, the rate of interest thereon; all other securities, their description and value. 6. The liabilities of such company, specifying the losses adjusted and due; losses adjusted and not due; losses unadjusted; losses in suspense and the cause thereof; losses resisted and in litigation; the amounts due banks or other creditors; the amount of money borrowed by the company; the rate of interest thereon and how secured; the net value of all policies in force, circulated as per the combined experience table of mortality, at four per cent interest, and all other claims against the company, describing the same. 7. Net surplus over all liabilities. 8. The income of the company during the preceding year, stating the amount received for premiums, specifying separately health, life, fire, marine or inland premiums, deducting reinsurance; the amount received for interest and from all other sources. 9. The expenditures during the preceding year, specifying the amount of losses paid during said term; the amount paid for return premiums. 10. The amount of risk written during the preceding year."

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Section 13 of the same act provides that "All insurance companies now doing business in this state, or that may hereinafter do business in this state, under the provisions of this chapter must file with the insurance commissioner annually, on or before the fifteenth day of April of each year, a statement under oath stating the amount of all premiums received by said company during the year ending December 31st preceding in this state, and the amount actually paid policy-holders during the same time, and shall pay into the state treasury a tax of two per centum on all such premiums collected, less the amount of all losses actually paid policy-holders, and premiums returned. The commissioner shall file such verified statement and schedule in his office and certify the amount of gross receipts, less amounts of losses actually paid policy-holders and premiums returned as aforesaid to the state treasurer. Within thirty days thereafter such insurance company shall pay or cause to be paid into the state treasury a tax of two per centum, or two per centum upon all such gross receipts, less such amounts of losses actually paid policy-holders and premiums returned in the state of Idaho, which payment, when made, shall be in lieu of all taxes upon the personal property of such company, and the shares or stock or assets therein."

The legislature of 1903 enacted a law with the following title: "To Authorize the Organization of Mutual Co-operative Insurance Companies, to Insure Both Personal and Real Property Against Loss by Fire, Lightning, Tornado, Cyclone, Windstorm, and the Fidelity of Persons and to Regulate Their Conduct."

This act was approved March 10, 1903 (Sess. Laws 1903, pp. 74-81, inclusive).

Section 1 provides for the organization as follows: "Any number of persons residing in this state who own personal or real property of not less than \$100,000 in value, which they desire to have insured, may associate themselves together for the purpose of mutual co-operative insurance against loss by fire, lightning, tornadoes, cyclone, windstorm and the fidelity of persons, and form an incorporated company for such purposes and issue policies. Such companies shall embody the words, 'Mutual Co-operative,' in its name."

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Section 2 provides that "The articles of incorporation of such company shall be filed with the insurance commissioner for examination. If by him found to be in accordance with the provisions of this act, and the name of such company is not similar to the name of any other insurance company organized in this state, he shall thereupon deliver to such company a certified copy of the articles of incorporation, which on being recorded in the office of the recorder of the county where the principal office of such company shall be located, and a copy thereof, certified by the county recorder, filed with the Secretary of State, the Secretary of State must then issue to the corporation, over his official seal, a certificate that a copy of the articles containing the required statement of facts has been filed in his office; and thereupon the persons executing the articles, and their associates and successors, shall be entitled to transact business for the term of fifty years, unless it is in the articles of incorporation otherwise stated, or by law otherwise specially provided."

Other sections of this act provide for the general management of the business of companies organized under the provisions of this law until the twelfth section, which provides for assessments, to wit: "All assessments shall be determined by proper classification and rating of the property insured, so that each member will be assessed according to the greater or less risk of the property insured to the hazard insured against. An assessment may be made on the members due and payable within thirty days thereafter, to enable the company to provide for losses and expenses necessary in the conducting of its business whenever the board of directors so determine. No assessment shall be made on a member for liabilities incurred prior to his or her membership. Any member may be excluded from the benefits of insurance during all the time in which he or she may be in default of payment of an assessment, and the acceptance of such assessment after the same has become delinquent shall not in any manner make the company liable for any loss or damage that may have occurred during the period that such policy was suspended. Any member shall not be liable directly to any other member for such other member's

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loss or damage, but the liability of a member shall be solely and exclusively through the channel and process of an assessment, and the amount of such assessment shall be only his *pro rata* share in proportion to the amount of insurance carried and rate on the same of all losses and expenses, making reasonable allowances and deductions for uncollectible and unpaid assessments."

Section 13 provides how losses shall be paid, and section 14 provides that any disputes between members and the company shall be settled by arbitration. Section 15 provides how a member may withdraw from the company and how his policy shall be canceled. Section 16 provides that such companies shall be bodies corporate. Section 17 provides for an annual statement requiring the president and secretary to prepare, under oath, a full and complete statement of the condition of the company on the thirty-first day of December each year and present the same at the annual meeting of the members. Section 18 provides for certificates, to wit: "It shall be the duty of such company to file an annual statement with the proper insurance department of this state not later than the thirty-first day of January of each year, on blank furnished by said insurance department. Such department, if it thinks necessary, or one deputized by it, having no interest in an insurance company and unprejudiced, may make an examination into the affairs of such company, and for such purposes shall have access to all the books and files of the company, and may examine the officers and other witnesses under oath. If such company is doing business in accordance with and under the provisions of this act, is solvent and properly managed, the insurance department shall furnish such company and its authorized agents a certificate stating that such company has complied with the provisions of this act and is authorized to do business for the ensuing year, unless certificate is sooner revoked. If upon such examination it shall appear to the department that the condition of such company does not justify it continuing in business, it may apply to the district court of the county where the principal office of such company is located for an order requiring such company to show cause why it

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should not be closed. For examining the company's annual report and issuing certificate it shall be paid \$——, and for each agent's certificate \$——."

Section 19 provides penalties for any company or agent to do business without authority given them by the insurance department. Section 20 permits other mutual insurance companies, doing business in this state under any of the provisions of the law thereof, with the written consent of a majority of the members, to accept the conditions of this act and thereupon be governed by it. Before such company shall be entitled to the benefits of this act, it shall file with the insurance department its articles of incorporation and by-laws and record a certified copy thereof as provided by section 2 of this act.

Section 21 provides: "All acts and parts of acts in conflict with the provisions of this act are hereby repealed in so far as they affect any company or companies hereafter organized under or taking advantage of this act."

We have endeavored to recite every provision of the Session Laws of 1901, as well as the act of 1903, that will throw any light on the questions that are submitted to us for determination. The plaintiff insists that it is subject to the provisions of the law of 1903 only, whilst the attorney general, for the defendant, insists that the plaintiff is not only subject to and controlled by the law of 1903, but all the provisions of the law of 1901. The entire contention seems to be the payment of the two *per centum* tax on the earnings of the company; yet, if we understand the articles of incorporation and by-laws of the plaintiff, we are unable to see how it can be affected by the provision of the law of 1901, requiring the payment of two *per centum* on the net earnings of the company, as it does not seem that there is ever a fund accumulated only as it may be necessary to pay losses or conduct the business of the company. The law of 1901, seems to have been enacted to require all classes of insurance companies—except fraternal organizations—to pay two *per centum* on their gross earnings, less their losses and premiums returned, and this shall be in lieu of their personal property taxes.

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It would seem that if the legislature did not want to encourage the citizens of the state to engage in insurance of the character contemplated by the organization and by-laws of the plaintiff corporation, that it would have been unnecessary to enact the law of 1903 with all its provisions governing companies of this character. We think it was the intention of the legislature to encourage the organization of corporations of this kind to engage in mutual insurance, and thus save the citizens of the state thousands of dollars that go elsewhere each year in payment of premiums. If a number of citizens can join together in an organization or corporation and by their mutual acts protect each other from loss by fire on the payment of the actual loss with the small expense of conducting the business, and thus save the payment of premiums to foreign corporations, it is certainly commendable in the citizens as well as just and wise legislation. The very fact that the legislature required that such companies should embody the words "Mutual Co-operative" in their names, is significant, and we think signifies that it was the intention to allow corporations of this character to conduct their business on a cheap, equitable plan and as an inducement to the organization of such companies, provided that they should be protected from the assessment of any taxes against them. The amount to be paid to the insurance commissioner is left blank in section 18 of the act, as well as the amount to be paid for each agent's certificate.

It seems to be conceded that the plaintiff paid the insurance commissioner \$50, and counsel for plaintiff does not dispute the right of the department to collect this sum from the plaintiff annually. This being true, we do not feel called upon to pass upon this question, as it has been paid, and the next legislature can make such modifications as seems best to settle the question of fees to be paid.

A number of authorities are cited by counsel for plaintiff in support of their contention that the act of 1903 is not class legislation. In our view of the case the legislature is empowered to pass any and all laws in the interest of the people and for the betterment of their condition. So long as they do not infringe upon the rights of one class in the interest of or

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for the benefit of another they are within their constitutional power, and in the passage of the act of 1903 providing for the organization of companies or corporations of the character of the plaintiff, we are unable to see any injustice done one class in the interest of another, hence the writ of mandate will issue.

This being a final action, and the defendant being a state officer, no costs are awarded.

Sullivan, C. J., and Ailshie, J., concur.

(July 5, 1904.)

MOE v. HARGER (BRADSHAW'S APPEAL).

[77 Pac. 645.]

WATER RIGHTS—NATURAL RESERVOIRS—DIVERSION OF WATERS—INJUNCTIVE RELIEF.

1. Evidence of expert and nonexpert witnesses with reference to the theory of the formation of a natural reservoir along the course of a stream examined, and held insufficient to justify a court in departing from the uniform and well-established doctrine, that the first appropriator has the first right; and in this case the position of appellants that their diversion and use of the water is not injurious or prejudicial to the rights of a prior appropriator lower down the stream is held untenable.

2. So soon as the prior appropriation and right of use is established, it is clear, as a proposition of law, that such appropriator is entitled to have sufficient of the unappropriated waters flow down to his point of diversion to supply his right, and an injunction against interference therewith is proper protective relief to be granted.

(Syllabus by the court.)

APPEAL from District Court in and for Custer County. Trial had before Honorable K. I. Perky, Judge. New trial denied by Honorable J. M. Stevens, Judge.

S. T. Moe commenced an action against a large number of appropriators and users of the waters of Big Lost river, in

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Blaine and Custer counties. A judgment and decree was made and entered determining the respective rights and priorities of all the parties to the action, and an injunctive order was incorporated in the decree running against all the parties to the action restraining and enjoining each from in any way interfering with or diverting or using any of the waters of Big Lost river except in accordance with the terms of the decree. From an order denying a motion for a new trial, Thomas Bradshaw and other defendants appealed. Affirmed.

The facts are stated in the opinion.

N. M. Ruick, for Appellants, cites no authorities.

Sullivan & Sullivan and G. F. Hansbrough, for Respondents, cite no authorities on the point decided by the court.

AILSHIE, J.—This action was commenced in the district court against numerous appropriators and users of the waters from Big Lost river in Blaine and Custer counties. The controversy on this appeal arises over the peculiar situation and condition of the waters of that stream. The river rises far up in the mountains and during the high or flood waters in April, May and June each year flows in a continuous surface stream from its source to a few miles below Arco in Blaine county, a distance of upward of seventy-five miles. It is shown that about twenty-five or thirty miles below Arco is a place called the "Narrows," where the valley through which the stream flows is only about one-fourth of a mile wide, the bedrock coming to the surface there and the mountains closing in, and above which point the valley widens out into a basin some eight miles wide. This valley or basin is covered with a thin soil, and contains an unascertained depth of gravel deposit and extends for a number of miles up the stream from the Narrows. It appears that after the close of the flood season or high-water period the stream flowing through this valley above the Narrows gradually lessens until it finally disappears for a distance ranging from eight to fourteen miles above the Narrows. During the entire season, however, the water rises at the Narrows

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and flows out through that point in a perpetual stream of about the same volume, flowing in the channel above the point where it sinks. It is shown by the evidence that in the springtime it takes from twenty to thirty days of high water or flood season to raise the stream and flood the valley above the Narrows sufficiently to cause the water to flow over the surface through the entire length of the valley. It is in this valley that the appellants in this case reside and have water rights subsequent, in point of time of appropriation and use, to the rights and claims of the respondents. At the trial appellants sought by the introduction of expert evidence and the testimony of witnesses who had lived in the community since 1872 to establish the fact that the taking of water from the stream above the point where it sinks and irrigating the lands within the valley above the Narrows does not in any manner lessen the flow of the water at the point where they rise and flow out through the Narrows at the lower end of the basin. In attempting to establish this proposition it was shown by at least one witness who has been familiar with the stream and country through which it flows since 1872, that there has been some irrigating going on in that basin for about twenty years, and that the water level in wells and other excavations made in the basin above the Narrows has been gradually rising from time to time until at the present time it is considerably higher than when he first made observations there. It is also shown that when he first knew the stream it went dry for a distance of at least fourteen miles from year to year during the dry or low-water period; whereas, in later years that distance has been shortening until it now goes dry for a distance of only about eight miles. In other words, the stream now sinks only about eight miles above the Narrows in the driest season of the year. In addition to this evidence, Mr. Ross, a civil engineer of wide reputation and recognized ability, who has also had large experience in practical irrigation, was called as an expert and testified to having made one examination of the stream and the basin above the Narrows and the general lay and contour of the country and the nature of the deposits therein. From his evidence it appears that the general level of the upper end of the

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valley is about one hundred feet above the point where the water rises at the Narrows. He says that in his judgment when the flood waters come they fill up and saturate the entire gravel and earthen deposits of the basin, and that when that is done the water rises until the stream runs in a continuous flow on the surface throughout the length of the valley. That as the dry season comes on the water begins to sink higher up the valley, while the waters from the higher grounds, percolating through the soil and gravel, gravitate to the lower points and thus force the stream out at the lower end of the valley or the Narrows. He also says that since this flooding process takes place once every year (in the spring months), and fills up the entire valley or basin, which serves as a natural reservoir, it thereby stores a sufficient water supply to cause a continuous and uniform flow of the stream through the Narrows. In keeping with this theory of the witness, he testifies that in his opinion the use of the water from the stream above where it sinks during the irrigation period would not in any appreciable degree diminish the volume of water discharged from the basin at the Narrows, and that all the water used in irrigating the lands of the valley or basin not taken up by plant and vegetable life and lost by evaporation will find its way back to the stream and serve as a constant feeder thereto. On cross-examination he testifies that in the ordinary irrigation of the lands in that valley about seventy-five per cent of the water spread upon the land will be lost by evaporation and absorbed by plant and vegetable life.

If the entire volume of water should be diverted from the stream above the point where it sinks and applied to the lands in the irrigation thereof, and by the process seventy-five per cent should be lost, and only twenty-five per cent ever reach the stream again, it would be difficult to understand by what process the stream would remain as large at the point where the water rises as it would have been had the seventy-five per cent of the original flow not been diverted and lost. This court has uniformly adhered to the principle announced both in the constitution and by the statute that the first appropriator has the first right; and it would take more than a theory, and, in fact,

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clear and convincing evidence in any given case, showing that the prior appropriator would not be injured or affected by the diversion of a subsequent appropriator, before we would depart from a rule so just and equitable in its application and so generally and uniformly applied by the courts. Theories neither create nor produce water, and when the volume of a stream is diverted and seventy-five per cent of it never returns to the stream, it is pretty clear that not exceeding twenty-five per cent of it will ever reach the settler and appropriator down the stream and below the point of diversion by the prior user.

Appellants complain of the action of the trial court in incorporating in the decree in this case an order perpetually enjoining them from in any manner interfering with or diverting or using the waters of Lost river except in accordance with the terms of the decree. By the decree the time was fixed from which each appropriator and claimant was entitled to have his right date and the number of inches to which he was entitled. It is the usual and approved practice in this state in all water cases where a decree is entered establishing the rights and priorities of the parties litigant to incorporate in the decree an order in the nature of cross-injunctions restraining each and every party thereto from in any wise interfering with the use of water by any other party thereto as fixed and established by the decree. That is what was done in this case, and we think it was proper to incorporate such an order in the decree.

A somewhat similar theory as to the storage and percolation of waters was advanced in the case of *Cartier v. Buck*, 9 Idaho, 571, 75 Pac. 612, and considered by this court at the February, 1904, term. In referring to the injunctive order contained in the decree, Mr. Justice Stockslager, speaking for the court, said: "Before the plaintiff in the lower court could obtain injunctive relief it was incumbent upon him to show that the use of the waters of Camas creek, or some of its tributaries, by the defendants, prevented the water flowing down to him in the natural channel, and also that, had they not disturbed it, it would have found its way to his premises." The right to the use of forty thousand inches of water from the Big Lost river was settled and decreed in this suit while the stream only carries nine thousand

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inches at low water. It is therefore clear that no water will be left for some of the subsequent appropriators. Where prior appropriators have diverted the amount of water to which they are entitled and, for example, say one hundred inches, to which the next appropriator is entitled, is left in the stream and a settler above diverts a part or all of the remaining water, the presumption must at once arise that such diversion will be to the injury and damage of the appropriator entitled thereto. So soon as the prior appropriation and right of use is established, it is clear, as a proposition of law, that the claimant is entitled to have sufficient of the unappropriated waters flow down to his point of diversion to supply his right, and an injunction against interference therewith is proper protective relief to be granted. The subsequent appropriator who claims that such diversion will not injure the prior appropriator below him should be required to establish that fact by clear and convincing evidence. In the Cartier case the trial court had found against the storage, reservoir, and sponge theories of appellant, and this court, after reviewing the evidence, concluded that there was a substantial conflict and that the judgment of the lower court should be sustained. In this case the conclusion of the expert witness and possibly one nonexpert, is to the effect that the use of the waters in the basin and above the Narrows by appellants will in no way diminish the flow below the Narrows and can in no way affect or injure prior appropriators down the stream below the basin.

Many of the answers given by these witnesses on cross-examination are, to our minds, irreconcilable with their general conclusions. Since the trial court heard all the evidence and found against the theories of appellants, we must conclude that he understood them, and we think his findings and judgment on that point are correct. The judgment of the trial court should be affirmed, and it is so ordered. Costs awarded to respondents.

Stockslager, J., concurs.

Sullivan, C. J., having been a party to the action in the lower court did not sit at the hearing and took no part in the decision.

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(July 6, 1904.)

JOHNSON v. HURST.

[77 Pac. 784.]

GOVERNMENT SURVEYS—MEANDER LINES—BOUNDARY LINES—ACTION TO QUIET TITLE—COLOR OF TITLE.

1. Where it appears from the notes and official plat founded thereon that all the lands within the legal subdivisions, as authorized to be laid out by section 2395, United States Statutes, have been returned to the government as surveyed and the remainder of the subdivision is shown to be the waters of a navigable stream, and the government issues its patent to a settler or purchaser for fractional subdivisions thereof abutting on a line which purports to meander such stream, the meander line will not be the true boundary line, but the patentee will take title to the stream.

2. Where the government has parted with a larger acreage than it has received pay for, by a patent to fractional lots abutting on a meandered stream, and the patentee takes possession, under his patent, of the lands between the meander line and the stream, he is entitled to be protected in his title and possession as against any and all third persons who do not claim title from the government.

3. *Id.*—In such case no one but the government or its grantee can be heard to question the title or right of possession.

4. Under section 4538, Revised Statutes, an action may be maintained to quiet the title to any interest or estate a person may have in lands of which the law takes cognizance.

5. Color of title exists wherever there is a reasonable doubt regarding the validity of an apparent title, whether such doubt arises from the circumstances under which the land is held, the identity of the land conveyed, or the construction of the instrument under which the party in possession claims his title.

(Syllabus by the court.)

APPEAL from District Court of the Fourth Judicial District in and for the County of Lincoln. Honorable Lyttleton Price, Judge.

STATEMENT OF THE FACTS.

After the trial of this case the district judge filed an opinion in writing, from which we take the following statement as to

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the issues made in the court below: "This action was commenced February 8th, this year, to quiet title to certain lands mentioned and referred to as lots 7 and 8 of section 6, and lots 5. 6 and 7 of section 5, township 9 south, of range 15 east, county of Lincoln, containing 111.38 acres. Plaintiff alleges ownership of the premises and sets forth his deraignment of title from the United States. He also alleges his open and notorious possession and cultivation and farming of the premises since January, 1887—the date of his succession to the title by conveyance from the patentee from the government. He alleges that about November 1, 1903, the defendant stealthily took possession of the premises during the temporary absence of the plaintiff therefrom. He further alleges that about October 14, 1903, the defendant first made a claim of title to the premises, and that he ever since and now maintains and claims title thereto and to the exclusion of the plaintiff's title, and asserts that defendant's said claim is without right, and that he has no estate in or right to the premises. Plaintiff alleges further that ever since defendant so obtained possession of the premises he has maintained such possession by threats of personal violence, refuses to quit such possession, and threatens to continue such possession. Plaintiff further alleges that at the time defendant took possession the plaintiff had on the premises valuable growing crops and several hundred tons of hay which defendant refuses to permit plaintiff to use for feeding his sheep."

Then follow allegations intended to show the necessity for the immediate restoration of the premises to the plaintiff for preparation of the same for farming and irrigating them the present year; also an allegation of the defendant's insolvency and inability to respond in damages and of consequent irreparable injury from the facts alleged.

Plaintiff prays that defendant may be required to set forth the nature of his claim, and that it may be determined, and that it be decreed, that defendant has no estate nor interest in the land and that the plaintiff's title is good; and that defendant be enjoined and debarred from asserting any adverse claim of title thereto. He also asks that a writ of injunction or restitu-

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tion be issued ejecting the defendant and restoring the possession to the plaintiff.

To this complaint the defendant answered denying the plaintiff's ownership of the several lots mentioned for want of sufficient information. Defendant further denies that he first made claim to the premises on October 14, 1903, or that he made claim to them at any other time, or that on November 1st, or at any other time, he stealthily or at all took possession of the same, or that he ever refused to quit or deliver up the same to plaintiff.

Defendant pleads also by cross-complaint, in which he sets up that on October 15, 1903, he being a citizen of the United States, entered upon certain unoccupied, unsurveyed lands of the United States, in said county, describing them by metes and bounds, containing not more than 160 acres, and recorded a notice of possessory claim and posted it on the land and entered into possession and still holds the same, and that within ninety days afterward he built a house and other improvements thereon of the value of \$200, and that he marked and staked the corners, and that he therefore is entitled to the possession of such land, subject only to the paramount title of the United States. He alleges that those lands so taken by him *lie immediately south of the lands described in the complaint, and between said lands claimed by the plaintiff and the north bank of Snake river*, and in his said cross-complaint he states that plaintiff claims and maintains title thereto adverse and to the exclusion of the defendant.

He prays that plaintiff be declared to have no estate or interest in the land claimed by the defendant, and that defendant be adjudged to be the owner of the land so taken by him.

It will be observed that the lands claimed by plaintiff are fractional subdivisions designated by lot numbers; also that defendant does not claim any part of them, but asserts that the land which he claims is other and different land lying between said lots and Snake river.

During the trial, and before defendant had offered any evidence, the plaintiff asked and obtained leave to amend his com-

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plaint, which he did by interlineation, adding to the description of the land by lot numbers, as stated, the words: "according to the official plat of the survey of said land returned to the General Land Office by the Surveyor General," and then further describing the said lots by the boundary line which would make the north bank of Snake river the southern boundary line of said lots.

To this amended complaint the defendant forthwith answered denying plaintiff's ownership of said lots (by number) for want of sufficient information, and further specially denying that they are bounded as set forth in the said amendment, and alleging that if they were so bounded, the land contained therein would amount to over four hundred acres. In other particulars defendant's answer to the amended complaint is substantially the same as to the original.

At the same time the defendant abandoned his cross-complaint and announced that he stood on the answer to the amended complaint alone.

From the same opinion we quote the following as the statement of evidence introduced upon the trial: "The evidence shows that Granville Brown entered the lots mentioned, and afterward, in October, 1889, secured a patent from the United States for them, in which they are described substantially as in the original complaint in this action, by number, section and township and 'according to the official plat,' " etc. The patent and a certified copy of the official plat are in evidence. On the plat these lots are shown as and appear to be bounded on the south side by what purports to be Snake river. Each of the lots, as platted thereon, is marked with the area in acres contained therein, and together they aggregate the area stated in the complaint—111.38 acres. From the plat it appears that there is no land between these lots and the river bank. This constitutes the plaintiff's case as far as this branch of it is concerned.

The defendant put in evidence a certified copy of the field-notes of the survey and in connection therewith, testimony as to the situation of natural landmarks and roads relative to the

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river bank and a bluff or declivity of lava rocks on the premises, from which it must be concluded that notwithstanding appearances from an inspection of the plat, there is in fact a larger area of land between the river bank as it really exists, and the meander line river margin as it is shown on the plat, than the total area of the lots conveyed by the patent. This evidence is not specific as to courses and distances and area of land; and it is not from qualified surveyors. But the description of the premises by the witnesses with relation to established and recognized lines of public survey, roads and the bluff mentioned in the field-notes in section 5, and the actual width of the river between its banks, makes it sufficiently clear that there is at least 160 acres of land between the south boundary line of the plaintiff's lots, as surveyed and shown on the plat, and the real river bank. Besides, the plaintiff practically concedes such to be the fact, and rests his claim of ownership of it upon legal conclusions from the other facts in the case discussed below.

It is further shown in the evidence that the plaintiff has been in possession of all the land to the river, cultivating and growing alfalfa upon it and making hay for many years. That he did not, and does not, now live upon it as his place of residence, but has a house there which is most of the time occupied by certain employees and used in the farm work carried on there. That it is fenced and by means of the fences and the river and certain rock barriers is inclosed against the encroachments of stock. That there is a bluff or steep declivity or cliff of lava rock running through the land easterly and westerly some distance back from the river, forming the southerly edge of the bench of higher land, whereon, though within his boundaries, plaintiff has not attempted any cultivation. All the land cultivated by the plaintiff lies on the lower ground between this bench and the river. It is claimed by the defendant, and is shown by the field-notes, and is undoubtedly true, that in making and platting the survey the meander line on the north side of the river is run along the top of this bench at and near its edge, and that the lower land between it and the river is not included in the survey. From the plat, the lowland south of

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the meander line appears to be in the river. However this may be, the lots, if they extend to the river bank, would probably cover and contain at least twice the area called for by the patent and plat. This lower land, under the bench, is the land inclosed and cultivated by the plaintiff, and upon this land the defendant entered, and he admits that the land taken by him and staked out covers and includes at least twenty acres of plaintiff's alfalfa field. It appears that there is a road through this bottom land traveled more or less by the public, but that there are gates, maintained by plaintiff, across the road on both sides of the land, which have been kept closed, and one of them nailed up. There is no evidence that this is a public highway, though there is some testimony to the effect that a road overseer opened the gates or fence about the time of or since this controversy arose. This constitutes, in substance, all the material evidence in the case.

The findings of fact and conclusions of law made by the trial judge are as follows: "1. That plaintiff is the owner of lots 7 and 8, section 6, and lots 5, 6 and 7 of section 5, township 5 south, range 15 east. 2. That said lots are not bounded as set forth in plaintiff's amended complaint. 3. That defendant herein did not, on or about October 14, 1903, or at any other time, claim title to said lots, or any part thereof, nor now claims title by right of possession to any part thereof. 4. That defendant did not fraudulently or stealthily take possession of said land or any other land or maintain possession of said land or any other land by threats of personal violence. 5. That said lots extend to the meander line, on the south, which is the edge of the bluff north of Snake river, and no further. 6. That there is a body of land in excess of the area of said lots, lying between the southern boundary thereof, and the north bank of Snake river. 7. That plaintiff has no title to the land lying south of the southern boundary of said lots. 8. That said last-mentioned land is unsurveyed. 9. That defendant is occupying a part of such unsurveyed land. 10. That defendant is occupying or claiming no part of the lots in plaintiff's complaint mentioned."

Argument for Appellant.

"Conclusions of Law.

"1. Plaintiff did not by virtue of his patent to said lots acquire title to the land lying between said lots and the north bank of Snake river. 2. That plaintiff takes nothing by this action, and defendant is entitled to judgment for his costs herein, such judgment to be without prejudice to another action for possession."

After making and filing the findings of fact and conclusions of law above set out, judgment was entered that the plaintiff take nothing by the action and that defendant recover his costs. From the judgment and an order denying a motion for a new trial, plaintiff appeals. Reversed.

The opinion contains a statement of the facts.

E. A. Walters and E. M. Wolfe, for Appellant.

No one but the United States can question the patent and survey. (See *Nuswanger v. Saunders*, 68 U. S. 424, 17 L. ed. 599; *Beard v. Federy*, 70 U. S. 478, 18 L. ed. 88; *Cragin v. Powell*, 128 U. S. 691, 32 L. ed. 566; *St. Paul R. R. Co. v. Schurmeir*, 74 U. S. 272, 19 L. ed. 74; *County of St. Clair v. Lovington*, 90 U. S. 46, 23 L. ed. 59.) Where a survey and patent show a river to be one of the boundaries of the tract, it is a legal deduction that there is no vacant land left for appropriation between the river and the river boundary of such tract. (*Jefferies v. East Omaha L. Co.*, 134 U. S. 178, 33 L. ed. 872, 10 Sup. Ct. Rep. 518.) It has been held in all courts since the decision of *Atherton v. Fowler*, 96 U. S. 513, 24 L. ed. 732, that a person cannot forcibly and surreptitiously enter upon the actual inclosure of another on the ground that the title was in the United States, and thereby acquire a right of possession to the land within the inclosure, and the fact that defendant alleged that at some future time he intended to connect himself with the government by making application for the land as a homestead, did not give him any right against the plaintiff. An action to quiet title does not make it incumbent on us to prove a patent from the United States, either to Johnson or his

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grantor, if this be unsurveyed government land, which claim we deny. Peaceable possession by Johnson, until he was ousted by defendant, is all that we need to prove, unless he proves a better right or higher interest. (*McGovern v. Mowery*, 91 Cal. 383, 27 Pac. 746; *Wilson v. Madison*, 55 Cal. 5; *Funk v. Sterrett*, 59 Cal. 613; *Orr v. Stewart*, 67 Cal. 277, 7 Pac. 693; *Pennie v. Hildreth*, 81 Cal. 127, 22 Pac. 399; *Pierce v. Fetter*, 53 Cal. 18; *Fry v. Summers*, 4 Idaho, 424, 39 Pac. 1118.)

McFadden & Broadhead, for Respondent, cite no authorities on the points decided not found in the opinion.

AILSHIE, J. (After Making the Statement.)—The learned trial judge, after an exhaustive review of the authorities bearing upon the questions at issue in the case, announced the following propositions, which seem to us to have controlled his opinion and judgment in this case, and which we therefore quote in full from his opinion:

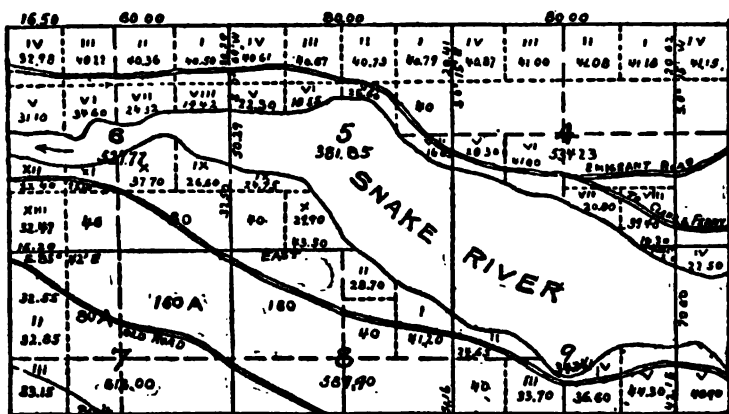
“If these authorities are to be followed and the principle adduced from them applied to the facts here, it must be held that the plaintiff's lots are bounded by the south line shown on the plat and that by the patent the government did not convey to the plaintiff's grantor any of the lands south of that line; and the court holds that under the facts in this case, the patent to the lots mentioned does not give the plaintiff title to the land to the margin of the river which lies opposite to and between them and the stream, amounting, as it is shown, to a quantity in itself exceeding the acreage bought and paid for by the patentee of the lots.

“Regarding the long-continued occupation and use by the plaintiff of the land under the south line of his lots, there is nothing in the evidence tending to show that his possession was of such a character as in any way to connect him with the government title to unsurveyed land, nor to initiate right or title or privilege to purchase from the government. He has never resided upon it; he inclosed and cultivated it, founding his right to do so upon his understanding and belief that because the plat shows his lots to be bounded by the river on the south, and having bought it, and the government having sold it, upon

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these appearances, the patent covered and included it. This, perhaps, is color of title; but whether it is or not, there is nothing tangible which a court can grasp or which is appreciable to the mind as title to the land within the scope and meaning of the word 'title' which the courts can reach and *quiet as title*. He has a possession not connected with any right except such as a bare possession gives him. In brief, he has no title which may be quieted, and his action to quiet title must fail."

In order to obtain a more thorough and comprehensive view of the situation and facts surrounding this case, it will be necessary to examine the official plat of the government survey as filed in the office of the surveyor general, the certified copy of which was introduced upon the trial of this case. A copy thereof showing sections 4, 5 and 6, and the north half of sections 7, 8 and 9, will therefore be reproduced here, and is as follows:



From the field-notes it appears that the surveyor started from the southwest corner of section 6, ran his line north, and upon reaching the "left bank of Snake river" established a meander corner for section 6, and thereupon crosses the river, a distance of 7.60 chains, "to right bank of Snake river" and there established another meander corner for section 6. From thence he ascended 13.04 chains to "top of bluff 200 feet above river." Again we find in the field-notes the surveyor leaving the corner to sections 5, 6, 7 and 8 and "descending gradually"

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43.50 chains "to left bank of Snake river canyon, 600 feet above the watercourse," where he establishes a meander corner between sections 5 and 8. And again, upon proceeding north between sections 5 and 6, he "descends gradually" from southwest corner of section 5, "32.50 chains to left bank of Snake river, 600 feet above the watercourse," where he establishes a meander corner between sections 5 and 6. Thence he crosses the river "to right bank of Snake river 800 feet above the watercourse west," where he establishes another meander corner between sections 5 and 6. In the notes of the meanders in sections 5 and 6, the surveyor starts from the meander corner on the north bank of the river where the township line crosses the stream; thence he apparently proceeds up the river, but upon arriving at the line between sections 5 and 6, he notes that he proceeds "thence in section 5 along bluff." After reaching the meander corner between sections 4 and 5, he crosses the stream to the meander corner between sections 5 and 8 and proceeds to run the meander line down the stream on the left bank thereof, and notes: "I run in section 5 along high bluff"; but upon reaching the meander corner on the left bank of the river between sections 5 and 6, and as he is about to proceed on down the river, he notes: "Thence in section 6," but makes no mention as to whether he is proceeding along the bluff or bank or the water's edge.

It should be observed in the outset that according to the field-notes and the official plat founded thereon, all the lands contained in sections 5 and 6 appear to have been surveyed both upon the north side as well as the south side of the Snake river. The plat shows 381.85 acres of land contained in the fractional section 5, and 527.77 acres in fractional section 6. The plat shows the remainder of those fractional sections as being taken up or covered by the Snake river. It is therefore clear that so far as the government is concerned, and the general land office which represents that branch of the government, all the lands lying within section 5 and 6 have been surveyed and returned to the land office, and the lands therein contained have been thrown on the market for settlement and sale. No other survey has ever been made by or on account of the government,

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and it appears in evidence in this case, that the defendant went to the land office and applied to file upon the lands which he now occupies, and was informed by the proper officials that there was no vacant land within those sections, and his application to file was thereupon rejected. The government has at no time complained of the plaintiff having or occupying more land than belongs to him, nor has it ever asserted any right to any part thereof. In this connection it should be further observed that upon the official plat no distinction is made between the lines meandering the Snake river through sections 5 and 6 and the lines representing the right and left banks of the Snake river through those same sections. The conclusion would necessarily follow that the meander line on the right bank of the river is the same as and coincides with the water line on that side of the river, and the same is true of the meander line and water line on the left bank. This same conclusion is deducible from the field-notes except as to the meander lines through section 5. Considering the field-notes and plat themselves, separate and apart from any oral testimony in the case, the conclusion would necessarily be that the meander lines run through section 5 are on the banks of the river, and that the banks are precipitous bluffs ranging from 200 to 800 feet above the water.

The primary question which arises in this case is: Has the plaintiff any such title to the land in controversy that he can maintain his action under section 4538, Revised Statutes, to determine and quiet the same? The principal contention made by the defendant and that upon which the trial court apparently decided the case, is that the plaintiff by his patent from the government only acquired title to the meander line, and that all the lands between that line and the water line of the river are the public, unsurveyed and unappropriated lands of the United States, to which the plaintiff has no title or right. It is conceded as the general rule of law that the meander line run in surveying public lands bordering upon a navigable river is not a line of boundary, but one designed merely to point out the sinuosity of the bank of the stream, and as a means only of ascertaining the quantity of land in the fraction that is to be

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paid for by the purchaser, and that the watercourse, and not the meander line as actually run on the land, becomes the true boundary line. (*Horne v. Smith*, 159 U. S. 40, 15 Sup. Ct. Rep. 988, 40 L. ed. 63; *St. Paul R. R. Co. v. Schurmeier*, 74 U. S. (7 Wall.) 272, 19 L. ed. 74; *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. Rep. 808, 838, 35 L. ed. 428; *Jefferies v. East Omaha Land Co.*, 134 U. S. 178, 10 Sup. Ct. Rep. 518, 33 L. ed. 872; *Fuller v. Dauphin*, 124 Ill. 542, 7 Am. St. Rep. 388, 16 N. E. 917; *Clute v. Fisher*, 65 Mich. 48, 31 N. W. 614; *Ridgway v. Ludlow*, 58 Ind. 249; *Kraut v. Crawford*, 18 Iowa, 549, 87 Am. Dec. 414; *Schurmeier v. St. Paul R. R. Co.*, 10 Minn. 82, 88 Am. Dec. 59; *Mitchell v. Smale*, 140 U. S. 406, 11 Sup. Ct. Rep. 819, 840, 35 L. ed. 442; *Stoner v. Rice*, 121 Ind. 51, 22 N. E. 968, 6 L. R. A. 387.)

It is claimed, however, by the respondent in this case that there is an exception to the general rule, and that where the quantity of land between the meander line and the water line is equal to or in excess of the amount contained in the fraction up to the meander line, that then the rule ceases and the exception prevails, and in such case the meander line is also the boundary line. In support of this proposition we are cited to the following authorities: *Barnhart v. Ehrhart*, 33 Or. 274, 54 Pac. 195; *Little v. Pherson*, 35 Or. 51, 56 Pac. 807; *Horne v. Smith*, 159 U. S. 40, 15 Sup. Ct. Rep. 988, 40 L. ed. 68; *Niles v. Cedar Point Club*, 175 U. S. 300, 20 Sup. Ct. Rep. 124, 44 L. ed. 174; *Glenn v. Jeffery*, 75 Iowa, 20, 39 N. E. 160; *Bissell v. Fletcher*, 19 Neb. 725, 28 N. W. 303; *Fuller v. Shedd*, 161 Ill. 462, 52 Am. St. Rep. 380, 44 N. E. 286, 33 L. R. A. 116; *Fulton v. Frandolig*, 63 Tex. 330; *Lammers v. Nissen*, 4 Neb. 245.

Barnhart v. Ehrhart was an action for trespass. The plaintiff alleged that he was the owner of certain lots in fractional sections in Umatilla county, adjoining the Umatilla Indian Reservation. It appeared in that case that a couple of surveys had been ordered of the tract of land and that each new plat made differed from the other. The original survey as shown by the field-notes and plat appeared to have meandered "the dry bed of a creek" called Wild Horse creek. It appeared quite

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conclusively that the line in that case did not purport to meander a navigable stream as meander lines are authorized by section 2395, United States Revised Statutes. The meander line there, however, appears to have been run under the provisions of that section authorizing such lines where a survey abuts on an Indian reservation. The real difficulty in that case appears to have been that the line did not really meander the line of the Indian reservation, and vacant land was therefore left between the two. It is true that the court in that case announced the general exception contended for by the respondent in this case. The opinion, however, concludes with this significant language: "The field-notes of the survey of 1871 do not purport to be a meander of Wild Horse creek, nor does the amended plat contain the name of that stream, and, as the original field-notes showed 'the dry bed of a creek' at the section lines crossed by Wild Horse creek, it may be that the surveyor erred in locating the boundary of the Indian reservation, in view of which the instruction requested became important; and hence it follows that the judgment is reversed, and a new trial ordered." *Little v. Pherson* rests entirely for its authority upon *Barnhart v. Ehrhart*.

In the case of *Horn v. Smith* the appellant, who owned fractional sections abutting on a bayou or savannah opening into the Indian river in Florida, claimed that the true boundary of his land was the main stream of Indian river. The facts in that case are well illustrated by the language used by Mr. Justice Brewer as follows: "But the question in this case is whether the boundary of these lots is the bayou or the main body of the river. That a water line runs along the course of the meander line cannot, of course, in the face of the plat and survey, be questioned, but that the meander line of the plat is the water line of the bayou, rather than that of the main body of the river, is evident from the facts. In the first place, the area of the lots is given, and when that area is stated to be 170 acres, it is obvious that no survey was intended of over 700 acres. In the second place, the meander line, as shown on the plat, is, so far as these lots are concerned, wholly within the east half of sections 23 and 26, while the water line of the main body of the

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river is a mile or a mile and a quarter west thereof, in sections 22 and 27. Again, the distance from the east line of the section of the meander line is given, which is less than a quarter of a mile, while the distance from such east line to the main body of the river must be in the neighborhood of a mile and a half. Further, the description in the patent is of certain lots in sections 23 and 26, and, manifestly, that was not intended to include land in sections 22 and 27.

"These considerations are conclusive that the water line which was surveyed and made the boundary of the lots was the water line of the bayou or savannah, and there has been simply an omission to make any survey of the tract west of the bayou, and between it and the main body of the Indian river.

It is significant that in that case the lots claimed were portions of sections 23 and 26, and the meander lines thereof were within those sections, while the water line of the river was about a mile and a quarter to the west and in sections 22 and 27. It was therefore clear that the lots claimed by the plaintiff in that case were not to be found within the confines of the sections containing the lots for which he had received patent. This was one of the strong considerations which moved the court to hold that the lots claimed by the plaintiff had never been surveyed, and had never been intended to belong to or become a part of those legal subdivisions. It was held, however, that his line should go to a water line. That line was the water line of the bayou and not of the main stream.

Niles v. Cedar Point Club was a "marsh" case. It appears that the notes and official plat to which the patent referred showed that the survey ended at the marsh and did not purport to be a river, stream or other navigable body of water, and the court held that the plaintiff took his title with notice that he was not securing the marsh, but *only to the marsh*. The following language from that opinion shows clearly the principle upon which it is founded: "The meander line run by Surveyor Rice along the northern borders of the tracts patented to Margaret Bailey may not have been strictly a line of boundary (*St. Paul & P. R. Co. v. Schurmeir*, 7 Wall. 272, 19 L. ed. 74; *Hardin v. Jordin*, 140 U. S. 371, 380, 35 L. ed. 428, 432, 11 Sup. Idaho, Vol. 10—21

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Ct. Rep. 808, 838; *Horne v. Smith*, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 998), but it indicated that there was something which had stopped the survey, which limited the area of the land which the United States was proposing to convey, and left to subsequent measurements the actual determination of the line of separation between the land conveyed and that which the government did not propose to convey. Generally, these meandered lines are lines which course the banks of navigable streams or other navigable waters. Here it appears distinctly from the field-notes and the plat that the surveyor, Rice, stopped his surveys at this 'marsh,' as he called it. These surveys were approved and a plat prepared, which was based upon the surveys and field-notes, and showed the limits of the tracts which were for sale. The patents, referring in terms to the survey and plat, clearly disclose that the government was not intending to and did not convey any land which was a part of the marsh."

Glenn v. Jeffery was a "bayou" case and very similar in principle to the Niles case.

In *Bissell v. Fletcher* it appears that at the time of the original survey there were two channels to the Republican river in Nebraska, and that the meander line followed the north channel of the river. After the plaintiff secured his patent for the fractional lots meandered on the north channel, the government appears to have caused a survey to be made of the lands between the north channel and the main channel of the stream and a patent was issued to the defendant for fractional lots therein. The controversy thus arose between the two grantees; the first claiming the lands to the main channel of the river, and the court holding that the original survey only extended to the north channel and that the patentee to those fractions did not acquire title to any of the lands south of the channel. That case we do not think throws any light upon the question under consideration.

In *Fuller v. Shedd* the supreme court of Illinois reviewed the authorities upon this question quite exhaustively, after which it said: "From these cases it will be seen, if there is such

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a mistake by the omission of lands in the survey between the meander line and the water that the proportion to that sold is great, it may be corrected by a resurvey. In the case here before the court the field-notes show the running of the meander line was across the ridge and at both the south and north sides of the lake. There was not such an omission of land from the survey that it is apparent a mistake was made, nor is there in the survey any evidence of fraud in the manner in which it was done."

Fulton v. Frandolig was an action for trespass, and the only question considered there was that of accretion and reliction, and is no guide for this case.

Lammers v. Nissen was a controversy between two patentees from the government where the original survey had left out a large tract of land between the meander line and the Missouri river. The government had thereafter recognized the mistake and had a survey made of the unsurveyed portion and thereafter patented it to the defendant. The court in that case held that the plaintiff could not recover beyond the meander line.

A careful examination of all these authorities discloses the fact that in no case considered have the facts been similar to those in the case at bar. In no case called to our attention where the court has refused to allow the grantee's true boundary line to extend to the main stream or water line has it appeared that the strip or tract of land claimed was within the section that contained the fractional lots patented, nor does it appear in any of those cases that the lands were returned as surveyed on all sides of the tract claimed. In other words, wherever it has appeared from the notes and official plats that all the lands within the legal subdivision as directed to be surveyed by the United States statutes have been returned as surveyed and the remainder of those subdivisions is shown to be the waters of a navigable stream, the courts have uniformly held that the grantee to lots or fractional subdivisions abutting on the meander line, takes title to the stream. The grantee would be at least entitled to take to the extent of the entire subdivision of which he has obtained patent to the fractional part. (*Stoner*

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x. Rice, 121 Ind. 51, 22 N. E. 968, 6 L. R. A. 387). Here there is no definite or satisfactory evidence showing the amount of land between the meander line and the stream; indeed, the true location on the ground of the meander line as traced from the field-notes is not shown or attempted to be shown. No surveyor testified in the case, and it does not appear that any surveyor ever attempted to locate the meander line. Some measurements were testified to by the defendant and his father in law, and a map was introduced (by whom made does not appear) which contains a yellow line drawn along the general course of Snake river, purporting to show the true location of the north bank of the river as it actually flows through those sections. That bears on its face some suspicion, however, by reason of the fact that it shows lots, located by the official survey on the south bank of the river, as actually north of the river. An official plat and survey cannot be impeached in this manner so as to transport a settler across the stream from the place of his actual settlement. (*Cragin v. Powell*, 128 U. S. 691, 9 Sup. Ct. Rep. 203, 32 L. ed. 566, and authorities there cited.) It is, however, an admitted fact in this case that the tract between the meander line and the water line comprises approximately as many acres as the patent recites as being in the lots themselves.

In this case the government by its patent has granted all its title to the five lots or fractional subdivisions in question to plaintiff's grantor and by that patent, which refers to the official plat in aid of the description contained in the patent, and from an inspection of which it appears that those lots comprise all the land between their northern boundary and the water line of the river. The government has never complained of any fraud having been practiced or any mistake having been made. It has never ordered a resurvey nor an additional survey and has never been heard to complain of the claims of the plaintiff. On the contrary, the plaintiff entered under his conveyance and took possession of the lands in question, and has improved, cultivated and occupied the same for more than seventeen years under color of title deraigned through the patent issued to his grantor. We know of no principle of law whereby any third

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party can now be heard to complain. If the government has parted with title to a larger acreage than it received pay for, that fact cannot concern the defendant nor any other third person who does not claim title from the government. Indeed, there is doubt if the government itself, under the facts in this case, could now be heard to question the plaintiff's title; but with that issue we have nothing to do in this case.

If it were conceded as a legal proposition that the plaintiff derived no title through the patent which was issued to these lots, still having entered upon the land in controversy situated between the bluffs and the meander line of the river, and having improved, cultivated and exercised complete dominion and control over that land for a period of seventeen years, and in the meanwhile never having had his title questioned, he would still, in our judgment, be able to maintain his action under section 4538, Revised Statutes, as against the defendant to quiet his title. By that section it is provided: "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

Sections 16 and 2825, Revised Statutes, recognize possessory rights to land as real property. Taking, in connection with these statutes, the legal presumption of title which always accompanies possession, we think the action to quiet title may be maintained although the plaintiff failed to show a fee simple title. It is clear that a person occupying premises under the circumstances surrounding this case, although his title from the government should entirely fail, still has a "color of title."

In *Wright v. Mattison*, 59 U. S. (18 How.) 50, 15 L. ed. 280 it is said: "The courts have concurred, it is believed, without an exception, in defining 'color of title' to be that which in appearance is title, but which in reality is not title. They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colorable title; the inquiry with them has been whether there was an apparent or colorable title, under which an entry or a claim has been made in good faith. . . . A

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claim to property, under a conveyance however inadequate to carry the true title to such property, and however incompetent might have been the power of the grantor in such conveyance to pass a title to the subject thereof, yet a claim asserted under the provisions of such a deed is strictly a claim under color of title."

In *Cameron v. United States*, 148 U. S. 308, 13 Sup. Ct. Rep. 595, 37 L. ed. 462, Justice Brown speaking for the court, said: "It is true there are cases to the effect that color of title by deed cannot exist as to lands beyond what the deed purports to convey; but where the deed is fairly open to construction as to what it does purport to convey, and at the time it was executed the land was officially surveyed according to the theory of the party claiming under such deed, it is manifest these authorities have no application. Color of title exists wherever there is a reasonable doubt regarding the validity of an apparent title, whether such doubt arises from the circumstances under which the land is held, the identity of the land conveyed or the construction of the instrument under which the party in possession claims his title."

In California it has been held that the action to quiet title under section 738 of the Code of Civil Procedure, and which is identical with our section 4538, embraces "every interest or estate in land of which the law takes cognizance." (*Pierce v. Felter*, 53 Cal. 18; *Wilson v. Madison*, 55 Cal. 5; *Orr v. Stewart*, 67 Cal. 277, 7 Pac. 693; *Pinnis v. Hildreth*, 81 Cal. 130, 22 Pac. 399. Last two cases cited with approval in *Pioneer Land Co. v. Maddox*, 109 Cal. 640, 50 Am. St. Rep. 67, 42 Pac. 295.)

This court held to the same effect in *Fry v. Summers*, 4 Idaho, 424, 39 Pac. 1118.

The plaintiff made a showing which entitled him to recover. The defendant was a naked trespasser and established no right either at law or in equity. Entertaining the views of this case as herein expressed, we see no reason for ordering a new trial.

The judgment will be reversed and the cause remanded, with direction to the trial court to make findings upon the evidence

Argument for Plaintiff.

heretofore introduced in harmony with the law of the case as herein announced, and render judgment in accordance therewith. Costs awarded to appellant.

Sullivan, C. J., and Stockslager, J., concur.

(July 7, 1904.)

HUMBIRD LUMBER COMPANY v. MORGAN, JUDGE.

[77 Pac. 433.]

JURISDICTION—ORDERS OF BOARDS OF EQUALIZATION.

1. An appeal taken when not authorized by law confers no jurisdiction on the court to which such appeal is taken, except to make its order and judgment dismissing such appeal.

2. There is no authority in this state for an appeal from an order of a board of equalization. *Feltham v. Board of County Commissioners, ante*, p. 182, 77 Pac. 332, approved and followed.

(Syllabus by the court.)

ORIGINAL application for a writ of mandate to the Honorable Ralph T. Morgan, Judge of the First Judicial District. Writ denied.

H. M. Stephens and Charles L. Heitman, for Plaintiff.

It will be seen from a statement of the facts and examination of the record that the district court undertook to sit and act as a court of review upon his own orders. It has no power or authority to so do. Having considered and passed upon a motion to dismiss the appeal, that order and motion is final and cannot by subsequent order be set aside. And in fact there is no order of the court attempting to set aside the order upon the first motion to dismiss the appeal, and that order is in full force and effect yet, and is binding upon the lower court, and leaves the case and continues the case before the lower court to be tried upon its merits. There is no statutory provision or authority in law for the district court reviewing an order

Argument for Plaintiff.

and decision theretofore made by it, and it can only so do, if at all, by motion for a new trial; and the Humbird Lumber Company contends that it could not do so by motion for new trial nor in any other method. (*Coyle v. Seattle Electric Co.*, 31 Wash. 181, 71 Pac. 733; *Burnham v. Spokane etc. Co.*, 18 Wash. 207, 51 Pac. 363.) When a court refuses to try a case upon the merits, and has jurisdiction so to do, *mandamus* to require the court to try the case or consummate the trial already had by making findings of fact and rendering judgment or decree is the proper remedy. (*Hays v. Stewart*, 7 Idaho, 193, 61 Pac. 591; *State v. Eddy*, 10 Mont. 311, 25 Pac. 1032; *Temple v. Superior Court*, 70 Cal. 211, 11 Pac. 699; *State v. District Court*, 13 Mont. 370, 34 Pac. 298; *State v. Webb*, 34 Kan. 710, 9 Pac. 770; *State v. Hunter*, 3 Wash. 92, 27 Pac. 1076; *State v. Lichtenberg*, 4 Wash. 653, 30 Pac. 1056; *State v. Superior Court*, 14 Wash. 687, 45 Pac. 670; *State v. McClinton*, 17 Wash. 45, 48 Pac. 740; *People v. Van Tassel*, 13 Utah, 9, 43 Pac. 625.) In the district court for Kootenai county, within the last two years, three decisions have been rendered holding that an appeal would lie in behalf of a taxpayer from an order made by the board of county commissioners, sitting as a board of equalization. The rule laid down in the case of *Rupert v. Board of Commrs. of Alturas County*, 2 Idaho (Hasb.), 19, 2 Pac. 718, and *Van Camp v. Board of Commrs. of Custer County*, 2 Idaho (Hasb.), 29, 2 Pac. 721, were decided under old territorial statute, and the subsequent legislation hereinbefore referred to has, we respectfully submit, changed the law so as to authorize an appeal. An appeal may be taken from any order, decision or action of the board while acting in an official capacity, by any person aggrieved thereby, or by any taxpayer of the county when any demand is allowed against the county, or when he deems any order, decision or action of the board illegal or prejudicial to the public interests. That the board of county commissioners is not a court within the meaning of section 2, article 5 of the constitution. Hence it follows that under section 18 of article 1 this court must be open to an aggrieved party by way of an appeal or an independent action wherein and whereby a trial *de novo*

Argument for Respondent.

can be had. And where there is a general statute on appeal, that remedy must be pursued rather than an independent or original proceeding. Section 12 of article 7 makes the board of county commissioners boards of equalization under such rules and regulations as shall be prescribed by law. And this being a part of the whole constitution must be construed in connection with section 2, article 5, and section 18, article 1, which constitute a rule or regulation of law; and the action of the board of county commissioners cannot, therefore, be final. It results that the constitution and general statutes as to the duties and powers of the board of county commissioners and the provisions and portions of the revenue law relative to the same subject are *in pari materia*, and must be construed together so as to give effect to the whole. (Sutherland on Statutory Construction, secs. 284, 285, 287; Black on Interpretation of Laws, pp. 204-260; *Mills v. Scott*, 99 U. S. 28, 25 L. ed. 294; *Pierce Co. ex rel. Malone v. Spike*, 19 Wash. 652, 51 Pac. 41.) The present statute provides a time other than a regular meeting of the board for levying taxes, and it surely will not be contended that the members of the board are acting in any capacity other than as county commissioners.

T. H. Wilson and C. W. Beale, for Respondent.

No appeal will lie from an order made by a board of equalization. (*General Custer Min. Co. v. Van Camp*, 2 Idaho, 44, 3 Pac. 22; *Olympia Water Works v. Board of Equalization*, 14 Wash. 268, 44 Pac. 267.) Any decision of the defendant must at least have been made in writing or entered in writing, and that not having been done, we have no other decision in the case than the judgment of dismissal, properly made and entered, and from which an appeal is allowed by law. In support of our contention that, to constitute an order or judgment, the same must have been in writing and made or entered in the minutes as such, we cite the following: Idaho Code Civ. Proc., sec. 4880; *People v. Lenon*, 77 Cal. 308, 19 Pac. 521; *Campbell v. Jones*, 41 Cal. 515; *Durant v. Comegys*, 3 Idaho, 67, 26 Pac. 755; *Clark v. Strouse*, 11 Nev. 76. If the plaintiff was dissatisfied with the judgment of the court dismissing

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its appeal, it had a plain, speedy and adequate remedy by appeal from such judgment of dismissal. Appeal, and not *mandamus*, is the proper remedy to review a judgment on a motion or plea to the jurisdiction of the court. (*Ex parte Railroad Co.*, 103 U. S. 794, 26 L. ed. 461; *Ex parte Baltimore etc. R. Co.*, 108 U. S. 566, 2 Sup. Ct. Rep. 876, 27 L. ed. 812; *In re Morrison*, 147 U. S. 26, 13 Sup. Ct. Rep. 246, 67 L. ed. 65; *People v. Garnett*, 130 Ill. 340, 23 N. E. 331.) *Mandamus* will not lie when there is a remedy by appeal; so held by this court in *State v. Whelan*, 6 Idaho, 78, 53 Pac. 2; *State ex rel. Smith v. Commissioners etc.*, 19 Wis. 253; 13 Ency. of Pl. & Pr., p. 530, and cases cited; *Tibbets v. Campbell* (Cal.), 27 Pac. 531. The writ of mandate does not lie to review judicial action of an inferior tribunal where the party injured has a remedy by appeal. (*O'Brien v. Tallman*, 36 Mich. 13; *Havens v. Stewart*, 7 Idaho, 298, 62 Pac. 682.)

AILSHIE, J.—The Humbird Lumber Company, a corporation organized and existing under the laws of the state of Washington and doing business in the state of Idaho, filed its application with the board of county commissioners, sitting as a board of equalization, for a reduction of valuation of certain of its timber lands located and situated in the county of Kootenai. The application came on regularly for hearing at the July, 1903, meeting of the board of equalization, and witnesses were sworn and examined both in support of and in opposition to the application, and the board thereafter made and entered its order granting a portion of the relief sought. From that order the plaintiff appealed to the district court. The appeal appears to have been taken in due and regular form, and at the following term of the district court in and for Kootenai county the county attorney made a motion for a dismissal of the appeal on various grounds, one of which was that an appeal does not lie from an order of the board of county commissioners while acting in the capacity of and performing the duties of a board of equalization. This motion was denied by the district judge, and thereafter the case went to trial and the plaintiff produced its evidence, and the court thereupon

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continued the case to enable the county to procure and produce further evidence. The case was subsequently called, and the county introduced its evidence, and the case was submitted for the consideration of the court. After having examined into the matter the judge appears to have notified the attorney for the plaintiff that he would find in favor of the plaintiff and for the attorney to prepare findings and judgment. Before the findings and judgment were made, however, the county, through its attorney, made and filed another motion for dismissal upon various grounds, among which it was alleged that no appeal lies from an order of the board of equalization, and that, therefore, the court was without jurisdiction to enter any judgment except one of dismissal of the appeal. After a hearing on this motion the judge sustained the same and dismissed the appeal. The plaintiff thereupon applied to this court for a writ of mandate requiring the district judge to proceed to make his findings and to render a judgment in the case. An alternative writ was issued, and the district judge, through his attorneys, appeared and demurred to the petition upon the grounds that it does not state facts sufficient for the issuance of a writ of mandate.

Numerous questions have been very ably and elaborately discussed by counsel in this case; but the conclusion we have reached makes it necessary for us to consider only one question, namely: The right of the plaintiff to appeal from an order of the board of equalization in equalizing assessments. If an appeal will not lie from such an order, then the district judge was without jurisdiction to enter any judgment in the premises except an order and judgment dismissing the appeal, which order he has already made. This question has been decided by this court at the present term adversely to the contention of petitioner, in *Feltham v. Board of Commissioners*, ante, p. 182, 77 Pac. 332. In that case we held that an appeal will not lie from an order of the board of equalization. We have given this question a further and careful examination in the present case to satisfy ourselves as to the correctness of our former decision, and are convinced of the soundness of the position taken in that case. We therefore rest our decision in this case upon the

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principles there announced. The right of appeal from such boards is purely statutory. Independent of statutory enactment no such right would exist. We cannot extend this right by interpretation to the orders and decisions of any board from which the right of appeal is not clearly granted. If the legislature desires to allow an appeal from the orders of boards of equalization, they have that power, but we are without authority to extend such remedy. The demurrer to the petition will be sustained and the writ denied.

Costs awarded to defendant.

Sullivan, C. J., and Stockslager, J., concur.

(July 8, 1904.)

DEEDS v. STEPHENS.

[79 Pac. 77.]

PAROL LEASE OF REAL ESTATE—CONFLICT IN EVIDENCE.

1. Where there is a substantial conflict in the oral evidence, the judgment of the court below will not be disturbed.

2. Where the specific performance of an oral contract to lease real estate for a term of more than one year is sought to be enforced, the parol agreement must be clearly proved to the satisfaction of the court.

(Syllabus by the court.)

APPEAL from the District Court of Nez Perce County.
Honorable Edgar C. Steele, Judge.

Action to enforce specific performance of an oral contract to lease real property for a term of ten years. Judgment for the respondent. Affirmed.

I. N. Smith, for Appellant.

McFarland & McFarland, for Respondent.

SULLIVAN, C. J.—This action was originally brought by the respondent, Deeds, against the appellant Stephens, to ob-

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tain a perpetual injunction enjoining the appellant from interfering in any manner with what is designated as the addition or annex to the Grand Hotel in the city of Lewiston. The defendant answered, and by cross-complaint demanded certain affirmative relief. The respondent answered the cross-complaint denying an alleged agreement for a ten year lease of said Grand Hotel, and alleged an oral agreement for a lease which was not kept by appellant and which was rescinded by both parties and also pleaded the statute of frauds. Upon the issues as thus made, the case was tried upon the cross-complaint of appellant and the answer thereto, and at the close of cross-complainant's evidence, on motion of counsel for respondent, a nonsuit was granted and judgment entered dismissing the case. From that judgment an appeal was taken to this court and a decision therein was handed down on June 11, 1902. (See 8 Idaho, 514, 69 Pac. 534.) In that opinion the statement of facts is very full and complete and we shall not repeat them here. This court there held that the evidence of appellant in support of her cross-complaint made a *prima facie* case, and that the court erred in granting a nonsuit. The cause was remanded for a new trial. A new trial was had and the judgment of the court was in favor of the respondent Deeds. A motion for a new trial was denied and this appeal is from the judgment and order denying a new trial. The transcript contains four hundred and sixty-five pages, and one hundred and sixty-six printed pages of briefs have been filed in this case, and numerous questions are raised by the assignment of errors.

In our former decision of this case, we held that an oral agreement to lease real estate for a term exceeding one year might be enforced where the evidence shows part performance and that where the evidence discloses part performance by all the parties to the agreement it removes the bar of the statute of frauds and may be enforced in a court of equity, and that in a suit for specific performance any damages, properly pleaded and proved, should be assessed by the court. This court there held that the appellant's evidence on the first trial sustained the material allegations of her cross-complaint, at least so far as the contract to lease the Grand Hotel for a term of ten years

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was concerned, and counsel for appellant contends that that is the law of this case, and it is as the case stood at that time. But it must be kept in mind that the nonsuit was granted at the close of appellant's evidence and before the respondent had put in any evidence whatever. On the new trial, after the appellant had introduced her evidence and rested, the respondent then introduced her evidence, and from an examination of all the evidence in the case as it now stands, it will show a substantial conflict on the material issues made by the pleadings.

The evidence of appellant shows, among other things, that she entered into an agreement with the respondent for a contract to lease said Grand Hotel for a term of ten years at the monthly rental of \$200 per month, to begin on the first day of January, 1902, and under and by the terms of said agreement, appellant was to execute a good and sufficient bond in the sum of \$3,000, conditioned that the respondent would construct an annex to said hotel and have the same completed on or about June 1, 1901, and upon the completion thereof, would lease and let the same unto the appellant from the time of the completion thereof to January 1, 1902, at \$45 per month, and would lease said entire hotel building to the appellant for a period of ten years from the first day of January, 1902, at the rate of \$200 per month, payable in advance, and conditioned that the appellant would accept said building and pay the rent therefor as provided by the terms of said lease, and do, perform and keep all covenants agreed to be kept by her, and that the respondent agreed to accept as sureties on said bond F. H. Wood and E. T. Vernon. The evidence shows that said alleged agreement was entered into in November or December, 1900, and the transcript shows that said bond was not executed until the thirtieth day of September, 1901, and was served on counsel for the respondent on the second day of October, 1901, and was introduced on the first trial of this case as part of the evidence of the appellant, which trial occurred about the eighteenth day of October, 1901, and that said bond was executed by said Wood and Vernon. A bond for \$1,000 executed by the same sureties and based on substantially the same conditions, was tendered to

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appellant by respondent on the second day of October, 1901, and introduced in evidence on the first trial of this case. This latter bond, I suppose, was for the purpose of meeting the contention of respondent in regard to the amount, time and conditions of the bond to be given under the alleged agreement, appellant contending that she was to give a bond of \$3,000, to continue for three years, with Wood and Vernon as sureties, and respondent contending that she was to give a bond for \$1,000, with good and sufficient sureties, conditioned that she would lease the hotel for a term of three years from January 1, 1902.

It appears from the evidence that Vernon and Wood acted as the agents for the appellant, and that one Isaman acted as the agent for the respondent, and that several interviews and conversations took place between them in regard to the construction of said annex and the lease of said hotel. Said Isaman testified that he informed Vernon that before he (Isaman) began the construction of said annex, he wanted a bond for \$1,000 with good sureties, conditioned that the appellant would take the building off from his hands as soon as it was completed or by the 1st of June, 1901, and lease it for the balance of that year and pay \$45 per month rental for said annex and lease said hotel for three years from January 1, 1902, and pay \$200 per month rental therefor; and that said Vernon agreed to prepare the bond and contract which he failed to do. Said Isaman further testified that he never agreed, at any time, to accept Vernon and Wood as sureties on the bond, and that he often requested the appellant to furnish said bond and that she never did furnish the bond as required by said agreement, or at all.

The record contains other evidence upon the material issues, but we have quoted sufficient therefrom to show that there was a substantial conflict in it as to the amount and terms of the bond and the sureties thereon and as to the time and terms of the lease of the hotel building after January 1, 1902.

"Upon the evidence introduced, the court made its findings of fact and conclusions of law and entered judgment thereon in favor of the respondent. *Inter alia*, the court found that after the agreement to construct said annex, and prior to the com-

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mencement thereof, the respondent demanded of the appellant said bond and agreement in writing, but was put off from time to time and that the respondent never did execute or deliver to the plaintiff said agreement or bond and that there never was any definite agreement between plaintiff and defendant for the leasing of said Grand Hotel to the respondent; and that all negotiations, propositions, proposals and agreements between the parties were rescinded by appellant and respondent at the instance of the respondent; that said respondent did not, at any time, agree to lease said Grand Hotel and premises to the appellant for a period of ten years, or at all; and that respondent did not agree to accept a bond in the sum of \$3,000 with Wood and Vernon, or either of them, as sureties thereto; and that no tender of any bond whatever was made by the appellant to the respondent prior to the commencement of the first trial in this action; and that on or about the eighth day of January, 1902, the appellant moved out of and surrendered possession of said hotel to the respondent and has not occupied or been in possession thereof since; and that prior to the commencement of the second trial of this action, the respondent had made no tender of any rental sum for said hotel.

"The court thus finds from the evidence before it that the alleged contract was never consummated; and, as there is a very substantial conflict in the evidence, under the well-established rule of this court, the judgment of the district court will not be reversed.

"The rule is well established that one who seeks to enforce a specific performance of the contract is bound to establish clearly and satisfactorily the existence of the contract and its terms. If the testimony be contradictory or doubtful, a decree for specific performance will be refused."

It was held in *Shropshire v. Brown*, 45 Ga. 179, that "A parol contract for land, like a reformation of a deed by parol proof, should be made out so clearly, strongly and satisfactorily as to leave no reasonable doubt as to the agreement." A court of equity will not decree specific performance of a contract if not clearly established. (2 Story's Equity Jurisprudence, sec.

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769, 770; 22 Am. & Eng. Ency. of Law, 1075; *Rice v. Rigley*, 7 Idaho, 115, 61 Pac. 290.)

There being a substantial conflict in the evidence and the appellant having failed to establish the alleged contract by that clear and satisfactory evidence which the law requires in such cases, the judgment of the court below must be affirmed. In this view of the case it is not necessary for us to pass upon the other errors assigned *seriatim*, or at all, as they are all subordinate to the main issue, as to whether said alleged contract was ever entered into between the parties.

Costs of this appeal are awarded to respondent.

Stockalager, J., and Ailshie, J., concur.

ON REHEARING.

(December 31, 1904.)

AILSHIE, J.—A rehearing was granted in this case and it was again argued at the October, 1904, term at Lewiston. As announced by a majority of the justices at the time the case was called for reargument, the only question upon which a rehearing was granted was to enable counsel to further present the question as to whether or not there is a substantial conflict in the evidence. Since the last argument in this case we have again examined the matter diligently, and are satisfied that there is such a substantial conflict as to prevent this court from disturbing the judgment. As was said in the original opinion, this was an action to enforce specific performance of a parol contract. The trial judge who saw and heard the witnesses was not sufficiently satisfied with the evidence produced to enter his decree for a specific performance. An examination of all the evidence given in the case leaves much doubt and uncertainty as to the character, terms and conditions of the alleged contract. Indeed, it leaves serious doubt as to whether or not the minds of the contracting parties ever really met on the material elements of the proposed contract. Under such circumstances it would be difficult, if not impossible, to ascertain the intent of the contracting parties. While courts of equity will, upon a

Points decided.

proper showing, as readily enforce specific performance of parol contracts as of contracts in writing, still they will never assume to complete or execute contracts which the parties themselves have only partially agreed upon and have never consummated. It has been frequently observed by the text-writers, as well as by the courts, that it requires a greater weight of evidence to enforce specific performance than it does to resist such an application. (1 Story's Equity Jurisprudence, 10th ed., sec. 769; 22 Am. & Eng. Ency. of Law, 1077; *Clark v. Maurer*, 77 Iowa, 717, 52 N. W. 522.) In this case the trial court declined to enter a decree for specific performance of the alleged contract, and we think in view of the uncertainty and doubt surrounding the alleged transaction, and the casual and desultory manner in which the parties dealt, the court was justified in making the findings and entering the decree made and entered herein.

The judgment will be affirmed, and it is so ordered, with costs to respondent.

Sullivan, C. J., and Stockslager, J., concur.

(July 9, 1904.)

RAPPLE v. HUGHES.

[77 Pac. 722.]

SALE OF PERSONAL PROPERTY—DELIVERY AND POSSESSION.

1. A sale of personal property is attacked as fraudulent under the provisions of section 3021, Revised Statutes of Idaho, 1887, on the grounds that it was not accompanied by an immediate delivery and followed by an actual and continued change of possession of the property transferred. Evidence examined and held that it is sufficient to support the findings and judgment of the court below.

2. The determination as to what constitutes immediate change and delivery and actual possession is purely a question of fact to be determined by the jury, or the court in case a jury is waived, from all the evidence in each particular case, following *Simons v. Daly*, 9 Idaho, 87, 72 Pac. 507.

(Syllabus by the court.)

Argument for Respondent.

APPEAL from the District Court of Lemhi County. Honorable J. M. Stevens, Judge.

From a judgment finding for plaintiff. Judgment affirmed.

The facts are stated in the opinion.

John H. Padgham and Quarles & Quarles, for Appellant.

The correct rule in cases of this kind is laid down by this court in *Harkness v. Smith*, 3 Idaho, 221, 28 Pac. 423, where it is said: "It is not enough that there is an actual delivery and an actual change of possession as between vendor and vendee, so long as the property, without legal excuse, is so placed back into the same condition and the same apparent relation to the vendor that there is no such manifest and continued change of possession as would indicate to the world that there has been a change of title." (*Norton v. Doolittle*, 32 Conn. 405; *Lawrence v. Burnham*, 4 Nev. 361, 97 Am. Dec. 540; *Wright v. McCormick*, 67 Mo. 426; *Dean v. Walkenhorst*, 64 Cal. 78, 28 Pac. 60; *Godchaux v. Mulford*, 26 Cal. 316, 85 Am. Dec. 178; *Bessinger v. Spangler*, 9 Colo. 175, 10 Pac. 809; *Hallett v. Parrish*, 5 Idaho, 496, 51 Pac. 109; *McFall v. Buckeye Granger's Warehouse Assn. et al.* (Cal.), 55 Pac. 253; *Engles v. Marshall*, 19 Cal. 320.) In the case at bar there was nothing to notify third parties of the sale or of the claims of the new owner. (*Clafin v. Rosenberg*, 42 Mo. 439, 97 Am. Dec. 336; *Herr v. Denver etc. Co.*, 13 Colo. 406, 22 Pac. 770, 6 L. R. A. 641; *Merrill v. Hurlburt*, 63 Cal. 495; *Bessinger v. Spangler*, 9 Colo. 175, 10 Pac. 810.)

H. G. Redwine and F. J. Cowen, for Respondent.

Under our view of this case there can be no question that the transfer was not fraudulent under said section 3021. At the time the sale was made, Rapple drove two miles and a half after said separator, taking "immediate possession of same," and the possession thereof remained in him continuously until levied upon by the sheriff. Rapple could have remained in possession of the separator in no other way than he did. The

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kitchen in which Rapple slept at the house owned by Roche was his home. He placed the separator by his trunk, and it was just as much in his possession. The fact that the room occupied by Rapple was the kitchen used by the Roche family is one to be considered by the jury in arriving at its verdict, but it cannot be contended that this alone is conclusive, and, if it is not, the judgment appealed from must be affirmed. As was said by the supreme court of California in the case of *Claudius v. Aguirre*, 89 Cal. 501, 26 Pac. 1077: "The circumstances connected with a transfer of personal property are so varied that it would be impossible to frame a rule applicable to each case, or to determine in advance what acts would be sufficient to meet the requirements of the statute."

STOCKSLAGER, J.—This action was commenced in the probate court of Lemhi county by the plaintiff against the defendant as the sheriff of said county, in claim and delivery, alleging that the sheriff wrongfully levied upon and took possession of one certain cream separator, the property of plaintiff; that before the commencement of this action he demanded possession of said property which was refused by defendant; that the property is worth the sum of \$125, and that he has been damaged by its wrongful detention in the sum of \$50. Defendant denies the ownership or possession of said property of plaintiff at any time; denies that the property was worth at the time defendant took possession thereof any sum greater than \$75, or that plaintiff was damaged in the sum of \$50, or any other sum, for the possession of said property by defendant. Further answering defendant alleges that in December, 1902, one Haman commenced an action in the probate court against one Frank Roche to recover the sum of \$64.17 for goods, chattels etc., sold by Haman to Roche, and on the sixteenth day of December, 1902, a summons was issued and served upon said Roche by defendant sheriff; also a copy of complaint. That on the eleventh day of December a trial of said cause was had in said court and judgment rendered in favor of plaintiff for the sum of \$63.37 and costs. On the 13th of December, 1902, execution was issued by virtue of said judgment com-

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manding defendant as sheriff of said Lemhi county to make the sum aforesaid out of the personal property of defendant Roche in that action. That on the fifteenth day of December, 1902, defendant, as sheriff, by Charles H. Simpson, deputy sheriff, duly levied upon the cream separator, goods and chattels mentioned in the complaint, and all the right, title and interest of the said Frank Roche; that the same was in the possession of said Frank Roche at Salmon City, and was the property of the said Frank Roche, by taking said cream separator into the possession of the defendant, and the defendant by virtue of being said sheriff now holds said property, under and by virtue of such levy for the purpose of making the amount of said judgment, and avers that he has a special property therein, and denies that he wrongfully withholds and detains said personal property from the possession of plaintiff, and denies that said plaintiff has, by reason of such possession of the defendant, been damaged in the sum of \$50, or any other sum, or at all. Alleges that Frank Roche has not paid the amount due and owing on said judgment. A jury was waived and trial by the court was had. Judgment for plaintiff from which defendant appeals.

Appellant insists that there was no change in the possession of the property in controversy such as the law contemplates, or any change whatever. The undisputed facts as disclosed by the evidence are that plaintiff was working for Frank Roche on what was known as the McDonald ranch, about two and one-half miles from Salmon City. In his settlement with Roche he accepted a note for \$90, and thereafter, on December 1st, he surrendered the \$90 note and took the cream separator in payment thereof, agreeing to pay a note due "on the company" of \$34—evidently meaning a note *to the company*. And he says at that time he got a bill of sale of the machine which was in evidence, to wit:

"Salmon, Idaho, Dec. 1, 1902.

"I have this first day of December, 1902, sold to William Rapp, subject to last note due of \$33.33 to the De Laval Separator, payable at Langsdorf & Company Bank, Salmon, on December 20, for ninety dollars (\$90) due him for labor done this summer on the McDonald ranch.

(Signed) "FRANK ROCHE."

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The witness says the above paper was given him at the time the separator was transferred to him, and is the only evidence of title he has; that he went and got the separator the same day and delivered up the note for \$90 to Roche. It was on the fifteenth day of December, 1902, that the deputy sheriff levied upon and took possession of the separator. On cross-examination the plaintiff testified that he worked on the McDonald ranch for Frank Roche and Phil Roche as a hired man; the two of them gave him a note due the next spring—May, 1903. They had the separator in the kitchen on the McDonald ranch. Garfield Roche went with plaintiff to get the separator; he is a brother of Frank Roche. They took it directly to the house of Frank Roche in Salmon and unloaded it in the kitchen of his house there, and in the room where plaintiff slept. Plaintiff was boarding with Frank Roche at the time and it was the only home he had; had his trunk there in the room. Plaintiff borrowed Frank Roche's team to go after the separator. These facts are gleaned from the evidence of the plaintiff, and none of them seem to be disputed by the appellants, hence the question, and apparently the only question, is whether there was a change in the possession of this property. Appellant very earnestly insists that owing to the fact that respondent had been working on the McDonald ranch for Roche during the summer, that he only took the cream separator from one of the places of possession of Frank Roche to another of his possession; that he used Frank Roche's team to remove it and the brother helped him, all indicating to the outside world that he was still in the employ of Frank Roche and changed the location of the separator at the instance of and for the benefit of Frank Roche.

Our attention is called to section 3021, Revised Statutes. It says: "Every transfer of personal property other than a thing in action, and every lien thereon, other than a mortgage, when allowed by law, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who

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are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or encumbrancers in good faith subsequent to the transfer." Counsel for appellant insists that this section of the statute under the construction given it in *Harkness v. Smith*, 3 Idaho, 211, 28 Pac. 423, precludes the plaintiff from a recovery in the action. Mr. Justice Huston, speaking for the court in that action, said: "Plaintiff brought action of claim and delivery for the recovery of possession of a stock of merchandise alleged to have been wrongfully taken and unlawfully detained by defendant"; then proceeds to state the following facts: On the twenty-first day of November, 1890, one P. Gallagher was, and for some months prior thereto had been, engaged in a general merchandise business in the town of Pocatello, Bingham county, Idaho. It appears by his own testimony that at the time he entered into the business he had about \$3,000 invested therein; that shortly after, for the purpose of erecting a store building, he borrowed \$2,000. The plaintiff is a ranch and stock man and capitalist residing at McCammon, about twenty-five miles from Pocatello. On November 21, 1900, Gallagher goes to McCammon, to the residence of plaintiff, and there makes a sale of his said stock of merchandise to the plaintiff, who at that time held a mortgage of \$4,000 on said stock of merchandise. The price alleged to have been paid by plaintiff was \$7,240. This included the stock and building. After deducting the amount of the chattel mortgage plaintiff says he paid the balance, \$3,240, to Gallagher in his checks which were paid. On the morning following the sale, plaintiff and Gallagher went to Pocatello. The clerical force in the store at that time consisted of a man by the name of Smith and the son and daughter of Gallagher. Harkness (plaintiff) said to Smith when he first went into the store on the day after the alleged sale by Gallagher to him: "Will you work for me for the same salary Gallagher has been paying you?" and Smith said he would. No invoice was taken, no change was made in the personnel of the establishment; no sign was changed. Gallagher continued in charge of the business as theretofore. The

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clerical force was the same, two of the employees being members of Gallagher's family. Gallagher continued to buy and order goods as before the alleged sale, except that the letter-heads were in the name of H. O. Harkness, and Gallagher signed all letters, checks, etc., "P. Gallagher, Mgr.," and this continued to be the condition of affairs up to the time of the levy of the attachment by defendant on February 25, 1891.

We do not think the facts in this case applicable to the one at bar. In the Harkness case the pretended transfer was made at McCammon, whilst the goods were at Pocatello, and no pretense of a delivery until the next day. When the pretended transfer was made the next day there was no appreciable change in any of the merchandise, the clerical force, the control or management of the business, or anything that would or could give the least intimation that there had been a change in the ownership of the business.

Hallett v. Parrish, 5 Idaho, 496, 51 Pac. 109, cited by appellant, involved the attempted or pretended sale of wheat in Nez Perce county. Mr. Justice Huston writes this opinion also and states the facts as follows: "On the third day of September, 1895, plaintiffs being partners under the firm name of Hallett & Morrison, purchased of one C. J. Landon, seven thousand bushels of O. K. No. 1 marketable wheat, to be delivered at top of tramway on or before sixty days; loss or damage by fire to be carried by the party of the first part. This sale was evidenced by an instrument in writing signed by C. J. Landon, attested with his seal, witnessed by Fred W. Hallett, one of the plaintiffs, and acknowledged before him as notary. On the twenty-third day of September, 1895, the defendant, as constable, levied an execution (issued by justice of the peace of said county upon a judgment against C. J. Landon) upon and seized eight hundred sacks of wheat upon the premises and in the possession of said C. J. Landon."

After this statement of facts the court, in summing up its conclusions, say: "There was no delivery nor any attempt of delivery at that time nor for quite a period thereafter. . . . The evidence showing conclusively that there had been no deliv-

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ery at the time of the sale by Landon to the plaintiffs of the wheat sued for in this action for any actual or continued change of possession thereof."

The undisputed facts in the case at bar do not bring it within the rule laid down in *Hallett v. Parrish*. It cannot be said there was no attempt at change in possession of the property in controversy in the face of the positive declaration of the plaintiff that he immediately took possession, and so remained in possession of the property until it was taken from him by the sheriff by virtue of the execution.

Counsel for appellant call our special attention to *Bassinger v. Spangler*, 9 Colo. 175, 10 Pac. 810, a Colorado case. The writer of this opinion, Mr. Chief Justice Beck, collected and discussed the decisions of a number of states containing statutes similar to our section 3021, and says: "The argument that a reasonable interpretation must be placed upon the statute, and that impossibilities should not be required, is recognized by us as sound. At the same time a purchaser cannot be permitted, in any case, to fold his arms after making his purchase, take no steps to complete the sale, and have his case excepted from the rule by reason of his good faith, and the inconvenience attending a substantial compliance with the statute. It is true, as suggested by counsel for the plaintiff in error, that the statute does not require impossibilities. A purchaser of two thousand sacks of grain cannot reasonably remove them all immediately. The purchaser of a kiln of hot brick cannot remove the brick while hot. But other acts can be substituted which will apprise the community of the change of ownership and satisfy the demands of the law." The writer cites *Lay v. Neville*, 25 Cal. 545, and quotes this language: "The acts that will constitute a delivery will vary with the different classes of cases, and will depend very much upon the character and quantity of the property sold, as well as the circumstances of each particular case." This seems to us to be the correct rule and is founded in equity and reason. It was followed in a recent case in this court—*Simons v. Daly*, 9 Idaho, 87, 72 Pac. 507. Mr. Justice Ailshie, speaking for the court, said: "While the evidence as to

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the 'immediate delivery' and 'continued possession' of the property claimed is by no means satisfactory, we are not prepared to say that it is insufficient to support the verdict and judgment. Every presumption is in favor of the judgment of a court of record, and error will not be presumed. Such judgment should not be disturbed until the appellate court is fully satisfied that error has been committed. There was some evidence in this case tending to show that the transfer was accompanied by immediate delivery and followed by actual possession. The jury evidently believed this evidence, and returned their verdict accordingly. We cannot disturb the judgment founded thereon upon the grounds of insufficiency of the evidence." Again, speaking of the question of immediate delivery and followed by an actual and continued change of possession as required by section 3021, Revised Statutes, the opinion says: "While this statute seems to be very plain, and at first thought it might occur to one that no difficulty or uncertainty could arise as to its application, still, when we come to applying it to the numberless facts, circumstances, surrounding conditions, and various relations which the parties may sustain toward each other, the problem accompanying any particular transaction assumes a much more serious aspect, and we begin to question ourselves as to what 'immediate delivery' and 'actual possession' really mean. Certainly no fixed rule can be established as a test for ascertaining these results. An examination of the numerous decisions of the courts under statutes similar to our own will at once demonstrate the futility of such an effort. It must be conceded, we think, that these are purely questions of fact to be determined by the jury from the evidence in each particular case." A number of authorities are cited in support of this conclusion. Again, it is said: "The evidence brought before us in this case is a most forcible reminder of the difficult duty which devolves upon a jury and trial court in passing upon evidence so close, unsatisfactory and conflicting, and amply illustrates the virtue in the oft-repeated statement that the jury and trial court meet the witnesses face to face, and hear them testify, and observe their demeanor, and are therefore in a better position than the appellate court to judge of the weight

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to be given to each and every statement made." Applying the rules laid down in this case to the case at bar, and what are the conditions? [We find that the plaintiff testifies that he worked on the McDonald ranch for Frank Roche and his brother; that he settled with them and on settlement there was \$90 due him for which he accepted a note due the next spring—he thinks in May; that after such settlement and after the note was given, he bought the property in dispute and surrendered the note in part payment and assumed the payment of an outstanding note of \$33.33, due on the separator; that immediately after the purchase he took possession of the property and removed it from its place of use on the McDonald ranch to the only home he had, which was at the residence of Frank Roche in Salmon. He occupied the kitchen in Frank Roche's house, and there had his trunk and this cream separator. So far as the record shows, all his worldly possessions were in that room. We do not think the law required him to rent a room elsewhere to store his property in order to give notice to the creditors of Frank Roche that he had bought this property. For aught we know, this might have forced him to abandon his property, as the rent of a storage room until such time as he could use it or dispose of it might have been in excess of his ability to pay, with any hope of realizing on his purchase. He had removed it from its former place of use to Salmon and stored it in his room; and we think this was sufficient compliance with the law.]

A trial by jury having been expressly waived by both parties in open court, the case was tried by the court, which court found that the delivery and possession was sufficient to entitle the plaintiff to recover, and we do not think his findings and judgment based upon the evidence should be disturbed.

The judgment of the lower court is affirmed. Costs are awarded to respondent.

Sullivan, C. J., and Ailshie, J., concur.

Argument for Appellant.

(October 3, 1904.)

CLARK v. ROSSIER.

[78 Pac. 358.]

PROBATE COURTS—JURISDICTION—VERITY OF JUDGMENTS AND ORDERS IN MATTERS OF PROBATE AND APPOINTMENT OF GUARDIANS.

1. Under the provisions of section 21, article 5 of the state constitution, probate courts are made courts of record, and are given original jurisdiction in all matters of probate, settlement of estate, of deceased persons, and appointment of guardians, and their orders and judgment in regard to those matters, cannot be attacked collaterally.

2. The remedy for one aggrieved by an order or judgment by a probate court in said matters is in said court by proper motion or by appeal.

(Syllabus by the court.)

APPEAL from District Court of Lemhi County. Honorable J. M. Stevens, Judge.

Action collaterally attacking the sale of certain mining claims under an order of the probate court. Judgment for the defendants. Affirmed.

The facts are stated in the opinion.

F. J. Cowan and Redwine & Boyd, for Appellant.

Section 2 of article 5 of the constitution vests the judicial power in all matters of probate, settlement of estates of deceased persons, and appointment of guardians upon the probate courts, and it makes these courts courts of record. It is to be here observed that the constitution does not in any place confer any authority or jurisdiction upon the probate judge in the matters enumerated, but upon the probate court. And in line with this authority the statutes of Idaho, at section 5491, provide that no sale of any property of an estate is valid unless made under order of the probate court. If the legislature intended anything else, then this act, in so far as it attempts to confer jurisdiction upon the probate judge, is void. For, obviously, the legislature had no authority to confer jurisdic-

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tion upon any other tribunal or any other officer in probate matters than that designated by the constitution. (*Spencer Creek Water Co. v. Vallejo*, 48 Cal. 70; *Larco v. Casaneuava*, 30 Cal. 564; *Chollar M. Co. v. Wilson*, 66 Cal. 374, 5 Pac. 670.) In most states the proceedings for the sale of real estate are adversary proceedings. In such proceedings parties defendant, as well as plaintiff, are essential. As the heirs occupy the position of defending parties, the petition should show who they are, in order that they may be brought into court. (Freeman on Void Judicial Sales, sec. 11, citing *Morris v. Hogle*, 37 Ill. 150, 87 Am. Dec. 243; *Hoard v. Hoard*, 41 Ala. 590; *Turney v. Young*, 22 Ill. 253; *Guy v. Pierson*, 21 Ind. 18.) To acquire jurisdiction to act, to order, decree or pass judgment, a court must have jurisdiction in two ways—of the thing involved and of the persons interested. This is primary and needs no citation of authorities to support it. If it fail in either way to acquire jurisdiction and that fact appears upon the face of its proceedings, as in the case at bar, its order, decree or judgment is a nullity and may be attacked at any time, at any place or in any manner, either directly or collaterally. (19 Am. & Eng. Ency. of Pl. & Pr., pp. 924-926; Black on Judgments, sec. 270; *King v. Randlett*, 33 Cal. 318; *Ex parte Sawyer*, 124 U. S. 200, 8 Sup. Ct. Rep. 482, 31 L. ed. 402; *Pryor v. Downey*, 50 Cal. 388; *Gibson v. Roll*, 27 Ill. 88, 30 Ill. 172; *Root v. McFerrin*, 37 Miss. 17; *Bloom v. Burdick*, 1 Hill, 134; *Townsend v. Tallant*, 33 Cal. 45, 91 Am. Dec. 617.) When one party has acquired the legal title to property to which another has a better right, a court of equity will convert him into a trustee of the true owner, and compel him to convey the legal title. (*Monroe Cattle Co. v. Becker*, 147 U. S. 47, 13 Sup. Ct. Rep. 217, 37 L. ed. 72; *Turner v. Sawyer*, 150 U. S. 578, 14 Sup. Ct. Rep. 192, 37 L. ed. 1189; *Cunningham v. Ashley*, 55 U. S. (14 How.) 377, 14 L. ed. 462.) The proper relief is not the amendment of the patent, but a decree compelling conveyance to rightful owner. (*Silver v. Ladd*, 74 U. S. 219, 19 L. ed. 138; *Wilson v. Castro*, 31 Cal. 421; *Bludworth v. Lake*, 33 Cal. 256; *Haven v. Haws*, 63 Cal. 452; *Salmon v. Symonds*, 30 Cal. 307.) Upon the question as to whether the

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court should consider the original complaint and first amended complaint as a part of the record, we desire to cite the court to the following cases which hold that those papers have performed their function in the case when the amended pleading is filed and that thereafter all proceedings are based upon the amended pleading: *Wooddy v. Jamieson*, 4 Idaho, 452, 40 Pac. 61; *People v. Hunt*, 1 Idaho, 436; *Barber v. Reynolds*, 33 Cal. 497.

John H. Padgham, W. B. Heyburn and John P. Gray, for Respondents.

Upon the validity of the sales of the property of deceased persons depend many of the titles to the realty in every state. There has been many times in the growth of our system of jurisprudence when the courts have required the strict compliance with the technical rules and regulations of the statutes in order to make these sales valid, but the injustice and the danger and inconvenience which arose from this strict adherence to the requirements of the statutes has resulted in a more just rule, and one which has received its strongest approbation in the decisions of the supreme court of the United States, and which has now been followed and approved by the courts of practically all of the states. The rule in substance is: That the decree of the probate court, where it has jurisdiction of the thing, cannot be attacked for irregularities in the exercise of that jurisdiction except in that court alone, or on an appeal from its decision. The great weight of modern authority holds that the same verity must attach to the judgments of probate courts as to the judgments of any other courts, and under our constitution, within the domain of their jurisdiction over probate matters, they are not more limited than is the district court in the exercise of its original jurisdiction in common-law and equity cases. (*Grignon v. Astor*, 2 How. 319, 11 L. ed. 283.) A court of general jurisdiction is one whose judgment is conclusive and which is competent to decide on its own jurisdiction and exercise it to a final judgment without setting forth the evidence. The record of such a court is absolute verity. Such a court is the probate court of this state.

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(*Gray's Admr. v. Cruise*, 36 Ala. 562; *Glendenning v. McNutt*, 1 Idaho, 592; *Horner v. Bank*, 1 Ind. 130, 48 Am. Dec. 358; *Hanna v. Yocum*, 17 Ill. 388.) In no court has the question of the validity of the sale of the property of a deceased person received the thoughtful and careful consideration which has been given to the question by the supreme court of the United States. (*Thompson v. Tolmie et al.*, 2 Pet. 157, 7 L. ed. 381, decided in 1829; 2 Pet. 169, 7 L. ed. 385; *Jenkins v. Stanley*, 11 Mass. 227; *Beauregard v. New Orleans*, 18 How. 503, 15 L. ed. 469.) In the orphans' court and all the courts which have power to sell the estates of decedents, their action operates on the estate, not on the heirs of the intestate. A purchaser claims not their title, but one paramount. The estate passes by operation of law. (*Stoddard v. Chambers*, 2 How. 310, 11 L. ed. 280; *McPherson v. Cunliff*, 11 Serg. & R. 426; *Wyman v. Campbell*, 6 Port. 219, 249; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. ed. 931; *Hall v. Law*, 102 U. S. 461, 26 L. ed. 217; *Davis v. Gaines*, 104 U. S. 386, 26 L. ed. 758.) A sale cannot be collaterally attacked for failure of the administrator to give the statutory notice of sale. (*Mathewson's Heirs v. Hearin*, 29 Ala. 210; *McNare v. Hunt*, 5 Mo. 301; *Tutt v. Boyer*, 51 Mo. 425; *Capt v. Stubbs*, 68 Tex. 222, 4 S. W. 467; *Spurgen v. Bowers*, an Iowa case, reported in 82 Iowa, 187, 47 N. W. 1029.) The confirmation or approval of the sale by the court is the judicial ascertainment of its validity and legality, and the decree so made cannot thereafter in any collateral proceeding be questioned. (Woerner on American Law of Administration, sec. 478; *Florentine v. Barton*, 2 Wall. 216, 17 L. ed., 783; *Davis v. Gaines*, 104 U. S. 391, 26 L. ed. 759; *Mathews v. Densmore*, 109 U. S. 220, 3 Sup. Ct. Rep. 126, 27 L. ed. 913; *Holmes v. Oregon & Cal. R. Co.*, 9 Fed. 236, 7 Saw. 380; *McArthur v. Allen*, 3 Fed. 322; *Daily v. Doe*, 3 Fed. 916; *Lorch v. Aultman*, 75 Ind. 166; *Barnett v. Van Meter*, 7 Ind. App. 45, 33 N. E. 670; *Cooper v. Sunderland*, 3 Iowa, 114, 66 Am. Dec. 52; *Howard v. Moore*, 2 Mich. 234; *Lafferty v. People's Sav. Bank*, 76 Mich. 35, 43 N. W. 39.) While the direct question now before the court has not been expressly determined or strictly put before this court heretofore, the decisions of the

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court in the cases of *Glendenning v. McNutt*, 1 Idaho, 592, and *State ex rel. Chemung Min. Co. v. Cunningham*, 6 Idaho, 113, 53 Pac. 451, announce the adherence of this court to the rule of the supreme court of the United States. (*People ex rel. Chemung Min. Co. v. Cunningham*, 6 Idaho, 113, 53 Pac. 451.) Subdivision 8 of section 3862 of the Revised Statutes of Idaho gives to every court the power to amend and control its proposed orders so as to make them conformable to law and justice. This court has held that this is a power which the probate court may exercise. (*People ex rel. Chemung Min. Co. v. Cunningham, supra.*) When a plaintiff comes into a court of equity alleging title in fee to land to be in the defendant and asks that such title be surrendered to him, it is incumbent upon such plaintiff to offer to do all the equity that lies in his power; Appellants have offered to do only a small part of what they can do or should do; they have not offered to pay respondents for the assessment work done on the mining claims; the petition for sale said it was necessary, and the order of sale required it to be done; they have not offered to pay for such permanent improvements as may have been placed on said ground by respondents, and owing to the importance of this point, it may not be improper to say that they know that a large amount of money has been expended on said mining claims by respondents in such improvements; their offer to surrender the purchase price paid to the administrator is upon condition and not absolute, as it should be, and their offer to reimburse and pay to respondents such sums of money as were expended in procuring the patent deed is also upon condition. (*United States v. White*, 17 Fed. 565; *Davis v. Gaines*, 104 U. S. 386, 26 L. ed. 757; *Galbraith v. Tracy*, 153 Ill. 54, 46 Am. St. Rep. 867, 38 N. E. 937, 28 L. R. A. 129; *Brown v. Buck*, 75 Mich. 274, 13 Am. St. Rep. 438, 42 N. W. 827, 5 L. R. A. 226.) In *Wolferman v. Bell*, 8 Wash. 140, 35 Pac. 603, the same court held "that the heir cannot maintain ejectment, for the reason that the real estate is in possession, actual or constructive, of the administrator, and he should not be allowed an action to quiet title, for the reason that it is the duty of the administrator to take every step necessary to protect the interests of

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the estate, and no complete title, even of an equitable nature, descends to the heir so as to be available to him during the progress of the administration." The petition being sufficient, the probate court then obtained jurisdiction of the subject matter. The court having jurisdiction of the subject matter by the petition, we claim that all proceedings thereunder in that court are conclusive on appellants until set aside by some direct proceeding for that purpose. If the court thus having jurisdiction errs in its subsequent proceedings in such cases, it is error reviewable only on appeal, or some direct proceeding to set aside, and cannot be questioned in any collateral proceeding. (*Hall v. Law*, 102 U. S. 461, 26 L. ed. 217; *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118; *Stuart v. Allen*, 16 Cal. 474, 76 Am. Dec. 551; *Cornett v. Williams*, 20 Wall. 226, 22 L. ed. 254; *Berrian v. Rogers*, 43 Fed. 467; *Satcher v. Satcher*, 41 Ala. 26, 91 Am. Dec. 498; *Weems v. Masterson*, 80 Tex. 45, 15 S. W. 590; 11 Ency. of Law, 2d ed., p. 1120.) Since the constitution of Idaho gave probate courts original jurisdiction in all matters of probate, all its orders and decrees have full force and effect until set aside on appeal or on motion in that court. If a void sale was made of the land in question, the probate court could have set it aside at any time upon proper application. (*Bland v. Bowie*, 53 Ala. 152; *Pettus v. McClannahan*, 52 Ala. 55; *Smith v. Flournoy*, 47 Ala. 345.)

SULLIVAN, C. J.—This action was brought to declare a trust and compel the conveyance of two mining claims situated in Lemhi county, and located and known as the Burlington and U. P. claims.

It is alleged in the complaint that David N. Clark was the original locator of said two mining claims, and that he died intestate on January 25, 1900, leaving the plaintiffs as his heirs at law; that said Clark was a resident of Lemhi county, and that his heirs were all nonresidents of the state of Idaho; that on or about the twenty-ninth day of January, 1900, the public administrator of said county was appointed and duly qualified as the administrator of the estate of said deceased; that as such administrator he filed his final account in said matter, in the

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probate court of said county, showing thereby that all of the debts of said decedent and the expenses of said administration had been paid, and that there was still a surplus remaining in said administrator's hands arising from the sale of the personal property of said estate; that a decree of distribution had been made in said matter; that the plaintiffs are citizens of the United States. Then follows a description, by metes and bounds, of said mining claims. It is then alleged that on the twenty-eighth day of August, 1900, after the probate court of said county had adjourned its August, 1900, term, the said administrator filed with the clerk of said court, a petition praying that said mining claims be sold; that thereupon the court made an order to show cause why an order of sale should not be made in said matter, and fixed the seventeenth day of September, 1900, as the time for hearing said matter; that on said date, said matter was heard, and an order was made authorizing said administrator to sell said mining claims; it is also alleged that said orders were made during the vacation of said court and not during term time thereof; that on said seventeenth day of September, 1900, the administrator made and executed a deed purporting to convey the title to said mining claims to the defendant Rossier; that by reason of said proceedings and said deed, and by permission given him by said administrator, the said Rossier, claiming to be a successor in interest to said mining claims, under and by virtue of said proceedings, took possession of said mining claims and still continues, with his codefendant, to hold and occupy the same. A copy of the petition for sale, and a copy of the order of sale, are attached to the complaint and made a part thereof.

It is further alleged that said order of sale was made and procured without giving notice of said order to show cause as required by the laws of this state; and that said heirs had no personal knowledge of any kind of said proceedings; that not more than twenty days elapsed from the date of making said order to show cause, and the date of making the order of sale; that said petition was filed and the said order to show cause issued, and the order of sale was made by the judge of said court at chambers, and not in open court; and that the price

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obtained for said mining claims was grossly inadequate; that said petition fails to state that a sale of the said property was desired or was necessary to pay debts, expenses of administration, or family allowances, and failed to state the condition, situation or value of the real estate sought to be sold, or any sufficient reason why the sale was desired; that by reason thereof, neither the said court nor the judge thereof acquired jurisdiction to order, approve, permit or confirm said sale; that by reason thereof, and by reason of the failure of said administration to give the said heirs any personal notice of the hearing of the order to show cause, and by reason of the failure of said administrator to give published notice of said order to show cause, required by law in such cases, and by reason of the fact that only twenty days elapsed between the filing of said petition and the hearing of the order to show cause, and by reason of the fact of the filing of said petition, the issuing of said order to show cause, and the making of said order of sale during the vacation of said court, and by reason that no notice of the intended sale of said property was given, the said order of sale, and deed and all the proceedings in reference to the attempted sale of said property were, and each of them was, void and of no effect, and transferred no title or interest in said mining claims to said Rossier.

It is further alleged that said Rossier made application to the proper United States office for a patent for said mining claims, and prosecuted said application for patent to completion, and made final payment therefor on the sixth day of May, 1901, and received a final certificate of purchase therefor; that said proceedings for patent are wrongful and in fraud of plaintiffs' rights; that by reason of all of said facts said Rossier took the title to said mining claims in trust for, and charged with the superior rights of the plaintiffs, and that as trustee of plaintiffs, he is in duty bound to convey the said mining claims to the plaintiffs.

It is further alleged that said Rossier transferred an undivided one-half interest in and to said mining claims to his codefendants, Charles and Horace Soule, and that said codefend-

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ants had full knowledge of plaintiff's right and title to said mining claims; that plaintiffs, and each of them, had received no knowledge or notice of said probate court proceedings for the attempted sale of said claims, and had no knowledge or notice of said application for patent, prior to the month of July, 1901; that plaintiffs, or either of them, have not received or accepted any part of the purchase price paid by said Rossier to said administrator for said mining claims, and offer to assign and surrender to defendants all claim to said amount, in case of a restoration of said property to them.

By the fifteenth paragraph of the complaint the plaintiffs offer to reimburse and pay defendant Rossier such sums of money as have been necessarily expended by them in securing the paramount title of the United States to said mining claims, upon the execution and delivery of a proper deed by defendants, conveying said property to plaintiffs.

Then follows a proper prayer covering the allegations of the complaint. The defendants, Charles H. and Horace W. Soule, demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and the defendant Rossier, demurred on the same ground, and also on the ground that the court had no jurisdiction of the subject matter of the action, which demurrers were sustained by the court, and judgment of dismissal entered.

This appeal is from the judgment. The error relied upon is the order sustaining said demurrers and the entry of judgment of dismissal.

It is contended by counsel for appellants that neither the probate court nor the judge thereof ever acquired any jurisdiction to order a sale of the said mining claims for three reasons: 1. That the petition was insufficient to give the court or the judge thereof jurisdiction; 2. That none of the proceedings were conducted in open court, but, on the contrary, were held by the judge at chambers during vacation; and 3. That the appellants were nonresidents, and the notice to show cause was not served personally; that the time fixed for the hearing was only twenty days from the date of filing the petition and

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making the order, when the statute requires not less than three weeks' notice, and there was no publication of the order to show cause for three successive weeks, as required by the statute.

In our view of the case, it is not necessary for us to pass upon the objections above stated.

It is contended by counsel for the respondents that the district court has no jurisdiction to entertain this action. It is contended that the provisions of our constitution and our statutes, and the decisions of the supreme court of the United States, and of the supreme court of many of the states of the Union hold the correct rule to be that the decree of a probate court, where it has jurisdiction of the thing, cannot be attacked for irregularities in the exercise of that jurisdiction, except in that court alone, or on an appeal from its decision.

It must be admitted that this action is a collateral attack upon the judgment or decree of the probate court, ordering and confirming the sale of said mining claims. Section 21 of article 5 of our state constitution provides, *inter alia*, that "The probate courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, and appointment of guardians."

The probate court of Lemhi county had jurisdiction of the property of said David N. Clark, deceased, situated within said county, as jurisdiction is given to it by said provision of the constitution, and by the laws of the state. No question is raised concerning the initiation of administration and appointment of an administrator. The appellants are here objecting to the erroneous exercise of jurisdiction in making the order of sales. Counsel for appellants contend that probate courts in this state are courts of inferior and limited jurisdiction, and that its jurisdiction to make any order or decree, or enter any judgment, must be shown on the face of the proceedings, and cites *Ethol v. Nicholls*, 1 Idaho, 741, and a number of early California cases. We have examined those authorities and are not inclined to follow the rule laid down by them, and expressly overrule the case of *Ethol v. Nicholls*, *supra*. As we understand it, the great weight of modern authorities hold that the

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same verity must attach to the judgments of probate courts in all matters of probate, settlement of estates of deceased persons, and the appointment of guardians, as to the judgments of any other courts of general jurisdiction, and clearly, under the provisions of our constitution, the probate courts of this state are not limited in their jurisdiction over probate matters, no more than are the district courts of this state in the exercise of their original jurisdiction in common law and equity cases. The decision of *Grignon v. Astor*, 2 How. (U. S.) 319, 11 L. ed. 283, clearly distinguishes between courts of original, general jurisdiction, the judgments of which import verity, and courts of limited and special jurisdiction wherein the proceedings must show the jurisdiction upon the face thereof.

In defining courts of original and general jurisdiction, the court in that case says: "These principles are settled as to the courts of record which have original, general jurisdiction over any particular subjects; they are not courts of special or limited jurisdiction. They are not inferior courts in the technical sense of the term, because an appeal lies from their decision." A court of general jurisdiction is one whose judgment is *conclusive*, until modified or reversed on direct attack, and which court is competent to decide on its own jurisdiction, and exercise it to a final judgment, without setting forth the evidence. The record of such a court is absolute verity. The probate court of this state, as far as its jurisdiction in regard to probate and guardian matters is concerned, is such a court. (Idaho const., art. 5, sec. 21; *Grignon v. Astor*, *supra*; *Gray's Admr. v. Cruise*, 36 Ala. 562; *Glendenning v. McNutt*, 1 Idaho, 529; *Horner v. Bank*, 1 Ind. 130, 48 Am. Dec. 358; *Hanna v. Yocum*, 17 Ill. 388.)

As the probate court had jurisdiction of the estate—the subject matter—jurisdiction of the proceedings and jurisdiction to make the orders complained of, they cannot be collaterally attacked as is sought to be done in this action. The remedy was by appeal from the order of the probate court, or motion, or other proceedings in that court to set aside the orders complained of. In section 61 of Van Fleet on Collateral Attack,

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it is said: "The test of jurisdiction . . . is whether the tribunal has power to enter upon the inquiry and not whether its conclusions in the course of it were right or wrong"; and in quoting from a Wisconsin case it is there said: "Had the court or tribunal the power under any circumstances to make the order or perform the act? If this be answered in the affirmative, then its decision upon those circumstances becomes final and conclusive until reversed by a direct proceeding for that purpose." (See *Thompson v. Tolmie et al.*, 2 Pet. 157, 7 L. ed. 381.)

Judge Baldwin, speaking for the court, concludes his very able reasoning in favor of the rule there laid down as follows: "We do not deem it necessary now, or hereafter, to retrace the reasons or authorities on which the decisions of this court in that, or the cases which preceded it, rested. They are founded on the oldest and most sacred principles of the common law. Time has consecrated them. The courts of the states have followed them, and this court has never departed from them. They are rules of property on which the repose of the country depends. Titles acquired under the proceedings of courts of competent jurisdiction must be deemed inviolable in collateral action, or none can know what is his own; and there are no judicial sales around which greater sanctity ought to be placed than those made of the estates of decedents by order of these courts to whom the laws of the state confide full jurisdiction over the subjects." (*Beauregard v. New Orleans*, 18 How. 503, 15 L. ed. 469; *Davis v. Gaines*, 104 U. S. 386, 26 L. ed. 757; *Thaw v. Ritchie*, 136 U. S. 519, 10 Sup. Ct. Rep. 1037, 34 L. ed. 531.)

It was held in *Mathewson's Heirs v. Hearin*, 29 Ala. 210, that a sale cannot be collaterally attacked for failure of the administrator to give the statutory notice of the sale, and in *Tutt v. Boyer*, 51 Mo. 421, that the approval by the probate court of an administrator's deed cannot be collaterally impeached. (*Spurgin v. Bowers*, 82 Iowa, 187, 47 N. W. 1029.)

In *Ryan v. Fergusson*, 3 Wash. 356, 28 Pac. 910, the supreme court of Washington held that an administrator's sale was a

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proceeding *in rem* to which all the world are parties, and that it cannot be collaterally attacked for irregularities. (See, also, on this point, *Mason v. Wait*, 5 Ill. (4 Scam.) 127; *Gibson v. Roll*, 27 Ill. 88, 81 Am. Dec. 219; *Campbell v. Harmon*, 43 Ill. 18; *Moore v. Porter*, 51 Wis. 497, 8 N. W. 364. See, also, *Kelly v. West*, 80 N. Y. 189.)

Cases are found in the courts of last resort of several of the states, which hold that no presumptions are allowed in favor of probate courts; that nothing is intended to be within their jurisdiction which does not affirmatively appear on the face of the record; that the record must show the existence of every fact which was necessary to authorize the judgment, or such judgment is void when questioned, either directly or collaterally. That doctrine is held in five or six of the states where probate courts are held to be inferior tribunals, and of special and limited jurisdiction. Cases so holding are found in California, Connecticut, Mississippi, Colorado, Florida, Oregon and Pennsylvania. (See Woerner on American Law of Administration, sec. 488.)

In the case of *Burriss v. Kennedy*, 108 Cal. 331, 41 Pac. 458, it would appear that the California supreme court is veering around in favor of the decided weight of authority upon the question here under consideration. In that case the court holds that there are the same presumptions in favor of the validity of a decree of a superior court, sitting in probate in proceedings for the sale of a decedent's lands, as a judgment at common law. But be that as it may, under the provisions of the constitution of the state of Idaho, above quoted, the probate courts of this state are made courts of record, and are given original jurisdiction of all matters of probate, settlement of estates of deceased persons, and appointment of guardians, and their judgment and decrees in those matters cannot be collaterally attacked. (See *Stow v. Schiefferly*, 120 Cal. 609, 52 Pac. 1000.)

In section 478 of Woerner on American Law of Administration, it is stated that confirmation or approval of the sale by the court for the judicial ascertainment of its validity and legality, and the decree so made, cannot thereafter in any collat-

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eral proceeding be questioned, except in those states in which judgments of the probate courts are collaterally assailable. The confirmation operates to cure previous irregularities in the proceedings. Section 448 of the last cited authority enumerates the several states that have adopted the common rule and those that have adopted the other. The remedy of the appellants in this matter was in the probate court either by appeal or otherwise, from its order or judgment.

For the reasons above stated, the judgment of the court below must be affirmed, and it is so ordered. The costs of this appeal are awarded to the respondents.

Ailshie, J., concurs.

(December 7, 1904.)

KARLSON v. HANSON & KARLSON SAWMILL COMPANY.

[78 Pac. 1080.]

WIFE'S SEPARATE PROPERTY—SALE OF SEPARATE PROPERTY—RECOVERY OF PURCHASE PRICE.

1. Where the wife sells her separate property without joining her husband in an instrument in writing conveying the same, as provided by section 2498, Revised Statutes, and the purchaser receives, uses and consumes the property and is thereafter sued for the purchase price, he is estopped from interposing the defense that the contract of sale was not entered into in the manner pointed out by the statute.

2. Section 2498, Revised Statutes, was enacted primarily for the protection of the wife against fraud and duress, and was not intended as a shield for the defense of those who would cheat and swindle her.

(Syllabus by the court.)

APPEAL from the District Court, Latah County. Honorable Edgar C. Steele, Judge.

Action on contract to recover the purchase price for a quantity of sawlogs. From a judgment of nonsuit and an order denying a motion for a new trial, plaintiff appeals. Reversed.

Argument for Respondents.

The facts are stated in the opinion.

Stewart S. Denning, for Appellant, cites no authorities upon the question decided by the court.

Orland & Smith, for Respondents.

Section 2498, Revised Statutes of 1887, provides that: "The husband has the management and control of the separate property of the wife during the continuance of the marriage, but no sale or other alienation of any part of such property can be made, nor any lien or encumbrance created thereon, unless an instrument in writing signed by the husband and wife, and acknowledged by her upon an examination, separate and apart from the husband, as upon a conveyance of real estate." By this section the husband has the management and control of the wife's separate property, by force of the law of this state, during the continuance of the marriage relation, but without the power of alienation. This whole section is mandatory, fixing the status of the separate property of a married woman. It not only limits the husband's right to sell or encumber it, but provides the only method by which the separate property of a married woman may be sold and conveyed. The wife has not the power or right to sell, any more than has the husband. The legal title is in the wife; the possession, management and control is in the husband; it therefore takes the concurrent act of both to alienate or encumber, and that on the part of the husband and wife, acting together, as provided by this section 2498, by an instrument in writing, signed by both husband and wife, and acknowledged by the wife, as upon a sale of real estate. (*Smith v. Greer*, 31 Cal. 478; *Dow v. Gould & Curry S. M. Co.*, 31 Cal. 631.) Under such statutes a transfer by the wife, without the husband joining in the instrument, is universally held absolutely void. Mere consent is not sufficient; actual joinder in the instrument must be had. (*Gregg v. Owens*, 37 Minn. 61. 33 N. W. 216; *Melley v. Casey*, 99 Mass. 241; *Meagher v. Thompson*, 49 Cal. 190; *Selover v. American Russian Commercial Co.*, 7 Cal. 274.) In *MacLay v. Love*, 25 Cal. 374, 85 Am. Dec. 151, Justice Sawyer used the following language: "It was repeatedly held by our predecessors that no title to the separate

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property of the wife, either real or personal, could be conveyed, except by an instrument in writing executed and acknowledged by her in the mode prescribed by this act." In this case, while the statute requires the alienation to be in writing, signed and acknowledged, the appellant seeks to recover upon an express contract, which violates the letter of the law and is prohibited by it.

AILSHIE, J.—The plaintiff, Charlotte Karlson, commenced this action against the defendants as a copartnership engaged in the lumbering business, and sought to recover upon two separate causes of action. In the first cause of action she alleges that prior to the commencement of the action she sold and delivered to the defendants ninety-six thousand seven hundred and ninety-two feet of sawlogs, for which they promised and agreed to pay her the sum of \$3 per thousand, and that after receiving the logs they neglected and refused to pay the purchase price. In the second cause of action she alleges that she sold and delivered to the defendants one hundred and twenty-one thousand and seventy-eight feet of sawlogs, for which they promised and agreed to pay the sum of \$3 per thousand, and that, after receiving the logs, they neglected and refused to pay. She prayed for judgment for the total sum of \$653.43, together with interest from the date of delivery. To this complaint the defendants answered, specifically denying all the material allegations thereof. The case went to trial before the court with a jury, and the plaintiff proved by her own testimony and that of other witnesses that at the time of the sale of the lumber for which she was suing she was the owner of a tract of timber land which, under the statute (Rev. Stats., sec. 2496), was her separate property, and that the defendants contracted with her to purchase the logs, for which they agreed to pay \$3 per thousand as alleged in the complaint. She also proved that the defendants received the logs, sawed them up and sold and disposed of the lumber. It was shown that the defendants had neglected and refused to make any payment on account of this transaction. After the plaintiff had concluded her case, defendants moved for a nonsuit on the ground "that all of the evidence introduced fails to show that the plaintiff ever at any time made or entered

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into any contract with the defendants, or either of them, for the sale of any property mentioned and described in the complaint, or any of her separate property." This motion was granted by the court, the jury was discharged, and a judgment of nonsuit was thereupon entered.

The plaintiff moved for a new trial and her motion was denied, and she appealed from the order denying her a new trial and from the judgment to this court.

The only question argued here is the right of the plaintiff to recover upon a contract which was not executed in the manner provided for by section 2498, Revised Statutes. The provisions of that section are as follows: "The husband has the management and control of the separate property of the wife, during the continuance of the marriage, but no sale or other alienation of any part of such property can be made, nor any lien or encumbrance, created thereon, unless by an instrument in writing, signed by the husband and wife, and acknowledged by her upon an examination, separate and apart from the husband, as upon a conveyance of real estate." The question for our consideration is: Whether or not a third party dealing with a member of the marital community, after securing the property about which they have assumed to contract, and using and consuming the same, can, when called upon to pay the purchase price, interpose the defense that the original contract was not executed by the husband and wife, joining in an instrument in writing, in the manner provided by section 2498, *supra*. The legislature in enacting section 2498 were endeavoring to prescribe the rights of both husband and wife in and to the separate property of the wife, and at the same time they pointed out the particular manner and method by which they might alienate such property. This statute has for its primary object the protection of the wife and the marital community of which she is a member, and at the same time it gives notice to all strangers to this community that any contract looking to a change of the title to any of the wife's separate property, in order to be enforced, must be executed in the manner therein prescribed. The title to the wife's separate property is vested in the wife, while the right of control and management thereof rests in the husband. A sale by the wife

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alone would be of no avail to the purchaser, unless the husband voluntarily relinquishes his right of control and management. If possession were taken by the purchaser without the consent of the husband, then he might assert his right of control and management in the courts. But none of these conditions arise in this case. Here the purchaser has received the property and no member of the marital community is questioning the statutory regularity of the transaction. The defendants who purchased, received and used the wife's property in this case knew at the time they entered into the contract—or at least are presumed to have known—that the contract was not executed in the manner provided by statute. Notwithstanding this fact, they received and enjoyed the fruits of the contract the same as if it had originally been entered into in the manner pointed out by law. In such a case we do not think the defendants can avail themselves of the provisions of this statute. This contract has been fully performed on the part of the plaintiff, and nothing remains to be done but the payment of the purchase price by the defendants. If the contract were wholly executory and either party were seeking to enforce it, then we would be confronted by the provisions of this statute. But here the defendants invoke the protection of a statute which was enacted for the protection of the plaintiff, and in such a case the defendants, as a matter of right and justice, ought to be estopped and precluded from questioning the manner or method of entering into the contract in the first instance. Otherwise a statute designed for the protection of the wife against fraud and duress would be converted into a shield for the defense of those who would cheat and swindle her. It should be sufficient now for them that they have received the property about which they assumed to contract. The contract so long as it remained wholly executory was certainly voidable, for the reason that legal evidence of its execution in the manner provided by section 2498 could not be furnished. On the other hand, after all the obligations which the *feme covert* attempted to assume by this contract became accomplished facts, and nothing remained to be done by her—the purchasers had the property—the only real issue which could then arise was: What did they promise to pay for it? The

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manner in which the contract was executed was no longer the controlling issue.

Dernham v. Rowley, 4 Idaho, 753, 44 Pac. 643, is not in point, as there an entirely different character of case was passed upon. The same is true of cases cited from California, as well as those from other courts.

The motion for nonsuit should have been overruled. The judgment and order of the lower court are reversed, and the case is remanded, with direction to grant the plaintiff a new trial. Costs awarded to appellant.

Sullivan, C. J., and Stockslager, J., concur.

(December 9, 1904.)

IN RE GUARDIANSHIP OF ARVA AND ELMER BRADY, INFANT CHILDREN OF JOHN C. BRADY, DECEASED.

[79 Pac. 75.]

GENERAL GUARDIAN—POWERS AND AUTHORITY TO INCUR EXPENSE IN LITIGATION OVER PROBATE OF WILL—JURISDICTION OF PROBATE COURT PLEINARY WHEN ONCE ACQUIRED.

1. The probate courts of this state have jurisdiction to appoint a guardian for minors domiciled in the state, and after having made such appointment the courts retain jurisdiction for all purposes in connection therewith until the guardian's accounts are rendered and he is legally discharged.

2. Where a testamentary guardian for minor children is named by the last will and testament of a decedent, and there is reasonable ground to believe that the will is valid and legal, a general guardian of the minors is justified in incurring the expenses necessary in resisting a contest of such will, even though he should fail to establish its validity.

3. In a petition for the settlement and allowance of a guardian's account, it is not necessary to allege the steps taken in procuring his appointment, since probate courts are, in such matters, courts of general jurisdiction, and every intendment is in favor of the regularity of their judgments and orders. (*Clark v. Rossier*, ante, p. 348, 78 Pac. 358, approved and followed.)

(Syllabus by the court.)

Argument for Appellant.

APPEAL from District Court in and for Kootenai County.
Honorable Ralph T. Morgan, Judge.

A petition was filed in the probate court of Kootenai county by Thomas J. Purcell for the allowance to him, as general guardian, out of the estate of Arva and Elmer Brady, minors, his costs and expenses incurred in conducting litigation over the probate of the will of their deceased father. A demurrer was sustained to the petition in the probate court and the petitioner appealed. The district court affirmed the judgment of the probate court, and from such judgment the petitioner appealed to this court. Reversed.

The facts are stated in the opinion.

Cyrus Happy, for Appellant.

The petition having alleged the appointment of appellant as guardian, and the demurrer having admitted all the facts stated in the petition, appellant contends that it will be presumed the probate court, in making the appointment alleged to have been made, had jurisdiction and authority to make the appointment, and that the order for judgment of the probate court cannot be successfully assailed in this collateral way. Section 3842 of the Revised Statutes of 1887 provides as follows: "The proceedings of this court (probate) are construed in the same manner, and with like intendments, as the proceedings of courts of general jurisdiction, and to its records, orders, judgments and decrees there is accorded like force, effect and legal presumption as to the records, orders, judgments and decrees of the district courts. Provided, that this section shall be applicable to its probate proceedings, records, orders, judgments and decrees only." (*Ollis v. Orr*, 6 Idaho, 474, 56 Pac. 162; *Van Fleet's Collateral Attack*, secs. 1, 841; *Woerner's American Law of Guardianship*, sec. 135; *Castetter v. State*, 112 Ind. 445, 448, 14 N. E. 388; *Kelley v. Morrell*, 29 Fed. 736; *People v. Wilcox*, 22 Barb. 178, 186; *Glendenning v. McNutt*, 1 Idaho, 592.) As general guardian it was the duty of appellant to attend to the interests of his wards in any proceedings in court concerning the estate of their father in which they were inter-

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ested. (Rev. Stats. 1887, sec. 5673.) This is specifically required in contests of wills. (Rev. Stats. 1887, sec. 5669; Woerner's American Law of Guardianship, p. 190.) This guardian acted in conformity with these requirements of the law. In the probate, district and this court he appeared as the guardian of these wards, and in no other capacity. Moreover, he was recognized in all those courts in the several trials had concerning this contest of the proposed will as the general guardian of the children. (*Pine v. Callahan*, 8 Idaho, 684, 71 Pac. 474.) It being the duty imposed by statute upon the guardian of these children to represent them in the proceedings instituted to contest their father's will, and in carrying out those duties, having incurred these costs, is he not entitled to be reimbursed at least to the amount thus paid out and incurred by him? (Stats. 1887, sec. 5796; Woerner's American Law of Guardianship, pp. 105, 194.) The guardian is entitled to be reimbursed for costs and counsel fees paid by him for professional advice, and for prosecuting and defending suits in the ward's interest necessary in the legitimate business of the ward's estate. (*Mathes v. Bennett*, 21 N. H. 204; *Holcomb v. Holcomb*, 13 N. J. Eq. 415; *Alexander v. Alexander*, 8 Ala. 796; *Curren v. Abbott*, 141 Ind. 492, 50 Am. St. Rep. 337, 40 N. E. 1090.) In conclusion, we respectfully claim that Father Purcell was duly appointed guardian of these minor children by the probate court of Kootenai county, and that said court at the time had jurisdiction of the parties and the subject matter. In any event, the question of jurisdiction and the regularity of the appointment cannot be raised by a demurrer in this case—that as such guardian it was his imperative duty to represent his wards. That he did so represent them in the will contest in which they were interested. That he was recognized as such guardian in all the courts through which the litigation was carried. That in performing this duty, the items embraced in his account, attached to his petition, were contracted and expended. It is too plain for citation of authorities that this is in the nature of a collateral attack, if it is anything, upon the judgment or order of the probate court which appointed appellant general guardian of these wards. (*Peyton v. Peyton*, 28 Wash. 278, 68 Pac. 757;

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Kalb v. German Sav. etc. Soc., 25 Wash. 351, 87 Am. St. Rep. 757, 65 Pac. 559.)

John B. Goode, for Respondent.

It is an admitted fact in this case that the infants who are entitled to receive the benefits of the insurance certificates and policies of insurance mentioned in the petition are domiciled in the county of Keokuk, in the state of Iowa, and have been so domiciled since the death of their last surviving parent, John C. Brady. It is also an admitted fact that a guardian has been appointed for the persons and estates of said infants by the district court of Keokuk county, Iowa, a court of probate jurisdiction, and that said guardian has duly qualified as such. The only question presented by the petition is, "Can the probate court of Kootenai county withhold from such guardian these certificates and policies of insurance until the claims set out in the petition are liquidated?" Or, "Can the amount of said claims be made a charge against said policies and certificates?" Such is the prayer of the petitioner, and we contend that the probate court of Kootenai county has not jurisdiction to either withhold the policies or make any order which would create a lien upon the proceeds. The minors in this case after the death of their parents took up their residence with their maternal relatives in the state of Iowa, and acquired their domicile. (See *In re Benton*, 92 Iowa, 202, 54 Am. St. Rep. 546, 60 N. W. 614; *Lamar v. Micou*, 114 U. S. 218, 5 Sup. Ct. Rep. 857, 29 L. ed. 94.) The preference due to the law of the ward's domicile, and the importance of a uniform administration of his whole estate, require that, as a general rule, the management and investment of his property should be governed by the law of the state of his domicile, especially when he actually resides there, rather than by the law of any state in which a guardian may have been appointed or may have received some property of the ward. (*Lemar v. Micou*, 112 U. S. 452, 5 Sup. Ct. Rep. 221, 28 L. ed. 751.) The judgment of the court of *superior* jurisdiction may be collaterally attacked upon the ground that the court by which it was rendered had no jurisdiction, either of the subject matter or of the

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person of the defendant or both. (*Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742; *Palmer v. Oakley*, 2 Doug. (Mich.) 433, 47 Am. Dec. 41; Woerner's American Law of Guardianship, 111.)

AILSHIE, J.—This case arose out of the facts and transactions disclosed in the case of *Pine v. Callahan*, 8 Idaho, 684, 71 Pac. 473. The appellant, Thomas J. Purcell, having been named by the purported will of John C. Brady, deceased, as the testamentary guardian of the minors, Arva and Elmer Brady, applied to the probate court of Kootenai county, and was on the twentieth day of July, 1901, appointed as general guardian of the persons and estates of the said minors. At the time of the death of John C. Brady, these two minor children were living and residing with their father in Kootenai county. Their mother had died some two years previous. The domicile of the minors was not changed after the death of their father, and still continued to be in Kootenai county at the time of the appointment of the appellant as general guardian. On the twenty-ninth day of July, 1901, it seems that Frank Pine, a resident of the state of Iowa, who is named in this proceeding as the guardian of the minors, was appointed by the district court of Keokuk county, Iowa, as guardian of the persons and property of the minors, Arva and Elmer Brady. It appears that some time between the twentieth and twenty-ninth days of July, 1901, the Iowa guardian, Frank Pine, who is a maternal uncle of the minors, in some surreptitious way, or at least not by an order of any Idaho court, removed the children from this state and took them to the state of Iowa. It is clear that Pine was neither the natural nor testamentary guardian of these minors, and it is doubtful if, under the facts in this case, he had any power or authority to change their domicile, although he removed them physically from the jurisdiction of the domicile. (*Lamar v. Micou*, 112 U. S. 452, 5 Sup. Ct. Rep. 221, 28 L. ed. 751.) It is shown by the record that the maternal and paternal grandparents of these minors were all living at the time of these transactions, but it nowhere appears that any of the grandparents ever changed the domicile of the minors or participated therein. Soon after the death of Brady, John C. Callahan, who was named as executor in

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the purported will, filed the document in the probate court of Kootenai county and asked to have the same admitted to probate as the last will and testament of John C. Brady, deceased. About the same time the respondent Pine filed a petition asking that he be appointed guardian *ad litem* for the purpose of contesting the validity of the document purporting to be a last will and testament. This petition was granted, and Pine was appointed as guardian *ad litem*, and thereafter successfully prosecuted the contest of the will to a final judgment in this court as announced in *Pine v. Callahan, supra*. After the conclusion of the litigation over the probate of the will, the general guardian, Thomas J. Purcell, who had been appointed by the Idaho court, filed his petition in the probate court of Kootenai county, accompanied by an itemized statement of his expenses and disbursements incurred in carrying on the litigation and prayed for a settlement and allowance of the same. To this petition Pine filed a demurrer, and at the same time an answer. The respondent interposed two grounds of demurrer: "1. That this court has no jurisdiction of the subject of the said petition; 2. That the petition does not state facts sufficient to constitute a cause of action, and to entitle the said petitioner to the relief prayed for therein." This demurrer was sustained by the probate court and judgment was thereupon entered dismissing the petition. From the judgment and order so entered the petitioner appealed to the district court where the matter was again heard upon the demurrer, whereupon the judgment and order of the probate court was affirmed. From the judgment and order of the district court the petitioner, Thomas J. Purcell, appealed to this court. The substance of the first contention made by the respondent in this case is that since the minors are beyond the jurisdiction of the courts of Idaho, and are under the care and protection of a guardian, appointed by the court of another state, that this court has lost jurisdiction of the subject matter. It should be here observed that the general guardian appointed in this state never came into possession of any property belonging to his wards, except three insurance certificates on the life of the deceased father, and in favor of the minors. These insurance policies

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have been in the possession of the guardian and the probate court of Kootenai county ever since the appointment of appellant as general guardian.

We do not understand how the unauthorized removal of the wards from the jurisdiction of the domicile to another state or the appointment of a guardian by a court of a foreign jurisdiction can oust the courts of this state of the jurisdiction which they had once acquired. There is no doubt but that when the wards were domiciled within this state and their only property, these insurance policies, were within the state, the probate court had jurisdiction to appoint a general guardian and to direct and control his conduct as such guardian. After having made such appointment the court retained jurisdiction for all purposes in connection therewith until his accounts are rendered and he is legally discharged. If the domicile of the wards should be legally transferred to another state and the wards retained no property in this state requiring the care and attention of the guardian, such facts might, and perhaps would, be cause for settlement of the account of the guardian in this state and his discharge. But that question does not arise in this case. It is argued, however, that the general guardian appointed by the probate court of this state, who was also named as testamentary guardian in the purported will, was without authority to conduct the litigation over the probate of the will and to incur expenses in connection therewith. We are not in accord with this view of the case. It would seem to us that where the will appeared to be legal and fair upon its face, as it did in this case, and by the terms of such will the testator had named a guardian for his minor children, it was within the scope of the guardian's power and authority to pursue reasonable methods for the proof and probate of that instrument. Sections 5669 and 5673 indicate a legislative intent to cover such cases as this. He was recognized and treated as general guardian by all the courts of this state throughout the entire litigation over the probate of the will. (See *Pine v. Callahan*, 8 Idaho, 684, 71 Pac. 473.)

The second point argued by respondent is that the petition does not allege that notice was given of the application for ap-

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pointment of a guardian as required by section 5707, Revised Statutes, and that it does not show that all the steps were taken as required by statute in securing the appointment of appellant. The argument under this point proceeds upon the theory that the probate courts of this state are courts of inferior and limited jurisdiction. That point has been decided by this court adversely to the contention of respondent in *Clark v. Rossier*, ante, p. 348, 78 Pac. 358. In that case it was said: "A court of general jurisdiction is one whose judgment is conclusive until modified or reversed on direct attack, and which court is competent to decide on its own jurisdiction, and exercise it to a final judgment, without setting forth the evidence. The record of such court is absolute verity. The probate court of this state, as far as its jurisdiction in regard to probate and guardian matters is concerned, is such a court."

The items for which appellant claimed allowance in the probate court and the amounts thereof are as follows:

"To A. C. Libby, court stenographer, for transcript.....	\$154 35
Printing transcript for supreme court.....	236 75
Printing brief of appellants for supreme court.....	117 30
Filing transcripts in supreme court.....	15 00
Cost transcript from probate court.....	17 00
Judgment for costs recovered by respondents in supreme court against appellants	45 00
Judgment recovered against appellants by respondents in district court.....	171 50
Witness fees and mileage for the following witnesses attending the probate court and district court trials:	
Dr. J. C. Cunningham, Dr. C. W. Roberts, Miss Anne Deems, and Miss Emma N. Orndorf.....	64 25
Copy of opinion of supreme court of Idaho.....	5 00
Attorneys' fee to Happy & Hindman, attorneys for guardian.....	600 00
Guardian's compensation.....	
Total.....	\$ "

Sections 5669, 5671 and 5796 provide for the payment of the reasonable expenses incurred by a guardian in the discharge of

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his duties, such as was done in this case. We are of the opinion, however, that after the probate court had decided against the validity of the will, and this appellant had appealed to the district court and that court had again decided against the validity of the will, the guardian would not be justified in charging up the costs and expenses of a further appeal against the estate of his wards. After two courts of general jurisdiction had decided against his contention, he had certainly fully discharged his duty toward his wards in his effort to sustain what purported to be a request by their deceased parent as to their guardianship, and we are not inclined to sanction the charge of that additional expense against the estate of the wards. In our view of this matter the appellant should be allowed his reasonable expenses incurred in the probate and district courts, and any judgments for costs which may have been there entered against him, and also reasonable allowance for attorney's fees in those two courts, together with such reasonable sum as to the probate court may seem just for the services of the guardian in attendance upon the trials in those courts. We also think it would be proper to allow the guardian the expense of securing a transcript of the stenographer's notes in the district court.

The judgment of the district court will be reversed and the cause remanded, with direction to the district court to overrule the demurrer and remand the cause to the probate court for a hearing upon the merits in conformity with the views herein expressed.

Costs of this appeal awarded to appellant.

Sullivan, C. J., and Stockslager, J., concur.

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(December 10, 1904.)

PRESLEY v. DEAN.

[79 Pac. 71.]

PRACTICE IN JUSTICES' COURTS—CHANGE OF VENUE—JURISDICTION—
STATUTORY PROVISION—COSTS.

1. Where a defendant on being granted a change of venue refuses to pay the costs of making a transcript of the justice's docket, provided by subdivision 1 of section 4643, Revised Statutes, it is the duty of the justice of the peace to proceed and try the case.

2. Where a defendant has obtained a change of venue, conditioned upon payment of the costs of a transcript of the docket, and fails to pay such costs, the oral notice of the justice to the attorney of the defendant that he will proceed and try the case at a certain time is sufficient.

3. A court of equity will not relieve a party where he has had a plain, speedy and adequate remedy at law, which by his own negligence, he has refused to avail himself of.

4. Where a justice of the peace has obtained jurisdiction of the person of the defendant, his jurisdiction continues until the action is legally disposed of.

5. Under the facts of this case, it was the duty of the justice of the peace to proceed and try the case when the defendant refused to pay the costs of the transcript required for a change of venue.
(Syllabus by the court.)

APPEAL from the District Court of Shoshone County. Honorable Ralph T. Morgan, Judge.

Action to restrain the defendant from selling certain property under execution. Judgment for defendant. Affirmed.

A. E. Mayhew and Henry P. Knight, for Appellant, cite no authorities not cited by the court in the opinion on the points decided.

A. G. Kerns, for Respondent, cites no authorities on the points decided not cited by the court in the opinion.

SULLIVAN, C. J.—This action was brought to restrain the sheriff of Shoshone county from proceeding to sell certain prop-

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erty levied upon, under an execution to satisfy judgment rendered in a justice's court against the appellant. The facts of the case are substantially as follows:

On the thirty-first day of October, 1900, the respondent commenced an action in said justice's court to recover a debt claimed to be due from the appellant. A summons was issued and made returnable on the fifth day of November, 1900. On that day both parties to the suit appeared in person and by attorney, and the defendant thereupon filed his motion for a change of venue. Said motion was granted on condition that the appellant pay the fees authorized by statute for a transcript of the docket. Thereupon the appellant promised to pay said fees and the justice of the peace proceeded to make a transcript of his docket, and on the next day notified appellant that he had done so and demanded his fee therefor and payment was refused. The justice informed the attorney for appellant that the transcript was ready and that he would deliver it whenever the costs were paid. The attorney replied that he did not have to pay and would not pay said fees. It appears from the record that there was some other conversation between the justice and the attorney for the appellant in regard to the payment of said fees. The fees remained unpaid until about the eighteenth day of November, when the justice notified the attorney that the case was set for trial on the twenty-second day of November, 1900, and would be tried on that date unless said fees were paid, and the attorney replied that he, the justice, could not try the case because he had lost jurisdiction.

The appellant having refused to pay the costs, the case was tried on the twenty-second day of November, 1900, and judgment was rendered against him. The plaintiff in that case procured a transcript of said judgment and had the same docketed in the district court as provided by law, and had execution issued, and placed the same in the hands of the sheriff who levied the same upon the property of the appellant and was proceeding to sell the same when this action was brought to restrain him from so doing. A temporary injunction was granted and on the trial of the case the injunction was set aside and a judgment of dismissal was entered in favor of respondent, from which judgment this appeal is taken.

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The only error assigned is that the court erred in entering judgment in favor of the respondent and against appellant.

Counsel contend that the order granting a change of venue upon payment of costs divested the justice's court of jurisdiction at the very moment the order was made, and cites in support of that contention *Hatch v. Calvin*, 50 Cal. 443; *State ex rel. Glein v. Evans*, 13 Mont. 244, 33 Pac. 1010; Idaho Rev. Stats. 1887, sec. 4643.

In the first case above cited, the order for the change of venue was an absolute one and not a conditional one as in the case at bar. The main point decided in the second case above cited was whether a motion for a change of venue was made in time, and is not a point in this case. Section 4643, Revised Statutes, provides that if an order has been made for a change of venue, the justice ordering the change must immediately transmit the papers to the justice to whom it is transferred "on payment of his costs by the party applying, all papers in the action, together with a certified transcript from his docket of the proceedings therein." That provision does not contemplate that the justice shall transfer the paper until the costs of making the transcript of his docket are paid, and a party cannot procure a change of venue and hang the case up by reason of his refusal to pay the costs of the transcript. It was not intended that a party could make application for a change of venue and when an order was made refuse to pay the costs and thus defeat the trial of the case.

It is next contended that the notice of the justice to the attorney for appellant that he would proceed and try the case on the 22d of November, unless the costs were paid, was not sufficient. We cannot agree with that contention. We think the notice was sufficient even though it was oral.

It is also contended that the docket of the justice does not show that evidence was introduced upon the trial and that the judgment is void for that reason. It is a well-recognized rule that a court of equity will not relieve a party where he has had a plain, speedy and adequate remedy at law, which by his own negligence he has not availed himself of. (*Wilkerson v. Walters*, 1 Idaho, 564; 1 High on Injunctions, secs. 163, 166,

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167.) The justice's court obtained jurisdiction of the person of the appellant by service of summons, and having once obtained jurisdiction, his jurisdiction continues until the action was legally disposed of.

The supreme court of Montana, in deciding the case of *Taney v. Vollenweider*, 28 Mont. 147, 72 Pac. 415 (which was a case similar to the one at bar), said: "It appears from the record of the justice of the peace court that after defendant Taney appeared in that action, he moved for a change of venue, which was granted upon the condition that he pay the accrued cost as provided by section 1484 of the Code of Civil Procedure. This he refused to do, and the justice proceeded to try the cause and entered judgment against him. It is now urged here that he did so without jurisdiction and that the judgment was, therefore, void. This was doubtless the theory upon which the district court proceeded in this cause in finding for the plaintiff. It would be an anomalous position, indeed, for a party to assume to say that he moved for a change of venue, and refused to pay the fees required as a condition precedent to the justice's transmitting the papers to another court, and then insist that the court of primary jurisdiction could not act further in the premises. We do not understand that a party by his wrongful act can secure such an advantageous position. Upon the refusal of Taney to pay the accrued costs as required by law, it was the duty of the justice of the peace to proceed with the trial."

We think the above quotation applies, with force, to the facts of the case under consideration. We find no error in the record, and for that reason the judgment of the trial court must be sustained, and it is so ordered. Costs are awarded to the respondent.

Stockslager, J., and Ailshie, J., concur.

Statement of Facts.

(December 15, 1904.)

GREAT NORTHERN RAILWAY COMPANY v. KOOTENAI COUNTY.

[78 Pac. 1078.]

APPEALS FROM ORDERS OF COUNTY COMMISSIONERS—FILING UNDERTAKING ON SUCH APPEALS—NOT JURISDICTIONAL.

1. An appeal from an order of a board of county commissioners is perfected by serving upon the clerk of the board a notice of appeal as required by section 1777, Revised Statutes of 1887, as amended by act of February 14, 1899 (Sess. Laws 1899, p. 248), and the giving and filing an undertaking is not jurisdictional, and the appeal should not be dismissed for a failure to give an undertaking in the absence of an order of the district judge requiring such undertaking.

(Syllabus by the court.)

APPEAL from District Court, Kootenai County. Honorable R. T. Morgan, Judge.

The Great Northern Railway Company appealed from an order of the board of county commissioners of Kootenai county, and its appeal was dismissed by the district court, from which judgment and order an appeal was taken to this court. Reversed.

STATEMENT OF FACTS.

On the 15th of September, 1903, the board of commissioners of Kootenai county, at a regular meeting thereof, levied a general road tax upon all the property taxable in their county for the year 1903, and at the same time made a levy for general bridge purposes, and also for general school purposes. The appellant, the Great Northern Railway Company, was at the time the owner of taxable property within said county, and was affected by the tax levy so made. Thereafter, and on the second day of October, 1903, the appellant served its notice of appeal upon the clerk of the board of county commissioners, and later also served a copy of the notice upon the chairman of the board of county commissioners. On the fourteenth day of October, 1903, the appellant filed with the clerk of the board a bond or

Statement of Facts.

undertaking on appeal in the sum of \$300, and on the same day filed in the district court of Kootenai county what was designated a complaint on appeal, setting forth its grounds of complaint against the action of the board of commissioners from which it had appealed, and served the same upon the prosecuting attorney of the county. On the twentieth day of October, the district court being in session, the cause was reached on the calendar and duly called by the presiding judge, and thereupon the prosecuting attorney for the county asked for time in which to answer the complaint then on file. Nothing further was done with the case in court until the twentieth day of February, 1904, but in the meanwhile the attorneys for the appellant and respondent carried on considerable correspondence relative to the preparation of a statement of facts to be submitted to the trial court, upon which the law of the case should be determined by the court. On February 20, 1904, the county, through its attorneys, filed a motion to dismiss the appeal. This motion was based on six separate grounds, but upon the argument in this court counsel for respondent abandoned the contention set out in paragraphs 1, 4 and 5 of the motion, and relied upon paragraphs 2, 3 and 6. Those paragraphs are as follows:

"2. That said attempted appeal was not perfected within the time required by statute in such case made and provided, by the filing of a good and sufficient undertaking on appeal, in this: that the notice of appeal herein was served on the second day of October, 1903, and the undertaking on appeal herein was not filed until the fourteenth day of October, 1903.

"3. That the undertaking or bond on appeal filed herein was defective, insufficient and void, and not such an undertaking or bond as is required by the laws of the state of Idaho, to wit, section 1776 of the Revised Statutes of 1887 of the state of Idaho, as amended by the act of the legislature of said state approved on the fourteenth day of February, 1899, and found at page 248 of the General Laws of the state of Idaho passed at the fifth session of the legislature of the state, A. D. 1899, and the act of February 23, 1899, regulating the surety companies, and found at pages 337-340 of the General Laws of

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the state of Idaho, approved February 23, A. D. 1899, and that said undertaking does not show, and was not accompanied with any evidence, documentary or otherwise, showing, *prima facie*, that the surety company mentioned in said undertaking had qualified to do business in the state of Idaho, by complying with the said act of February 23, 1899, or that the execution of said undertaking had been authorized by said surety company, or executed by the agents or officers authorized to execute the same, or executed according to the laws of the state of Idaho, or that the said surety company is authorized to do business in the state of Idaho by becoming surety on any bond or undertaking."

"6. That no bond or undertaking on an appeal has ever been filed herein which was approved by the clerk of the board of county commissioners or by the probate judge for the county of Kootenai, state of Idaho, as required by the statute in such case made and provided."

Before the hearing of respondent's motion to dismiss, the appellant filed a motion, supported by affidavits, asking leave, among other things, to make and file such bond or undertaking on appeal as the court by order might direct or permit it to file. After a hearing upon the motion to dismiss, and the counter motion made by appellant, and on the ninth day of April, 1904, the district judge made and entered his order sustaining respondent's motion and dismissing the appeal, and thereupon entered judgment of dismissal against the appellant, and for costs in favor of the respondent. From the judgment and order so made and entered, the railway company has appealed to this court.

M. J. Gordon and Charles A. Murray, for Appellant.

Section 1777, as it appears in the Laws of 1899 (in said section as amended), is as follows: "Such appeal may be taken to the district court, or the judge thereof, of the judicial district of which the county is a part, by serving upon the clerk of the board a notice of appeal so referring to the act, order or proceeding appealed from as to identify it; that upon notice in writing of such appeal being brought by any person to the

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attention of such judge, he shall fix the earliest time and place, convenient to himself, for the hearing of such appeal, which may be heard in a summary manner before him, or his court, and when in his opinion no serious injury will result from delay, the hearing shall be had during the next term of his court in the county from which the appeal comes. When the appeal is made for the purpose of protecting the interests of the county and of the people, no requirement shall be made of the appellant for security of costs, except that when the district judge shall be of opinion that such appeal is not made in good faith, but is for delay and vexation, he may require the appellant to enter into an undertaking with good sureties in an amount sufficient to secure the payment of costs, and in all other cases like undertaking shall be required." And hence the only provision now with reference to an undertaking is that an "undertaking shall be required" without specifying when or how. It is expressly provided, however, that the district judge is the one to make the requirement when it is to be made. Therefore, we say that the giving of an undertaking is not jurisdictional. It is a matter to be regulated by the court after the appeal has been taken by complying with the other provisions of the section, and that where, as in this case, an undertaking is tendered by filing one with the clerk of the court, such undertaking is sufficient unless upon objection being taken thereto a different one is required by the judge, and especially, as in this case, when it is given in the manner and amount required by the code. (Rev. Stats., sec. 4915.)

T. H. Wilson and Charles L. Heitman, for Respondent.

It is contended by appellant that no undertaking is required to be given on such appeal unless expressly required by the district judge. This argument is not applicable to the case at bar, but would be applicable to an appeal taken for the purpose of protecting the interests of the county and of the people. The appeal in the case at bar was taken by appellant as a private corporation, and the appeal was not taken for the purpose of protecting public interests. In the case of *Davis v. Elmore Co.*, 9 Idaho, 764, 75 Pac. 910, this court held as follows: "An appel-

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lant, from an order of a board of county commissioners, must file an undertaking on appeal as required by statute, when the appeal is not taken for the purpose of protecting the interests of the county and people. If he does not do so, his appeal is ineffectual for any purpose and will be dismissed on motion." The same contention was made by appellant in that case that is made by appellant in this case relative to the filing of an undertaking on appeal; that is, under the provisions of section 1777, an act amendatory thereof, of the Revised Statutes of 1887, no undertaking was required to be given. In the case of *Salt Lake Brewing Co. v. Gillman*, 2 Idaho, 195, 10 Pac. 32, which was an appeal from a justice of the peace, this court held that to effectuate such appeal, three things were required, to wit: 1. The filing of notice of appeal; 2. The service of a copy of the notice of appeal; 3. The filing of an undertaking. And all these things were required to be done within thirty days after the rendition of the judgment, the court holding that these three things must be done within thirty days, and that they were jurisdictional prerequisites.

AILSHIE, J. (After Making the Foregoing Statement of Facts.)—We have examined the statute and authorities on this question very carefully, and have concluded that this case rests entirely upon the question of what acts constitute an appeal from an order of the board of county commissioners. Section 1777 of the Revised Statutes of 1887, as amended by the act of February 14, 1899 (Sess. Laws 1899, p. 248), provides the manner of taking appeals from orders made by boards of commissioners. It says: "Such appeal may be taken to the district court, or the judge thereof, of the judicial district of which the county is a part by serving upon the clerk of the board a notice of appeal so referring to the act, order or proceeding appealed from as to identify it. . . . When the appeal is made for the purpose of protecting the interests of the county and of the people, no requirement shall be made of the appellant for security of costs, except that when the district judge shall be of opinion that such appeal is not made in good faith, but is for delay and vexation, he may require the appellant to

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enter into an undertaking with good sureties in an amount sufficient to secure the payment of costs, and in all other cases like undertaking shall be required." It is argued by counsel for the appellant that, under the provisions of the foregoing section, an appeal from the board of commissioners is perfected immediately upon service of the notice of appeal on the clerk of the board. It is further contended that giving an undertaking to secure the payment of costs is not jurisdictional, and depends wholly upon the order of the judge, and that such order can only be made by him after he has acquired jurisdiction of the case through the medium of the service of the notice of appeal upon the clerk of the board. A careful analysis of the statute convinces us that this is the correct construction to be placed upon it. The statute fixes no amount in which an undertaking shall be given in any case, but, rather, leaves it to the discretion of the district judge as to the "amount sufficient to secure the payment of costs." In no case would an appellant know the amount or kind of undertaking the judge would require, and yet he is entitled to appeal within the statutory time, even though the judge were out of the county or out of the district, or even out of the state. But the appellant who had failed to comply with the order of the judge as to the giving of an undertaking after his appeal had been perfected would certainly be liable to have his appeal summarily dismissed. It is admitted in this case that the appeal was not taken to protect the "interests of the county and of the people," but was, rather, taken for the protection of the private interests and property rights of the appellant. It will be observed that section 1777 closes with the provision that, in all appeals other than those for the protection of the interests of the county and the people, "like undertakings shall be required." This clause, however, refers to what precedes it, namely, "that when the district judge shall be of opinion that such appeal is not made in good faith, but is for delay and vexation, he may require the appellant to enter into an undertaking with good sureties in an amount sufficient to secure the payment of costs."

Counsel for appellant, in support of their position, cite *Ravenscraft v. Board of Commissioners*, 5 Idaho, 178, 47 Pac.

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942; and, on the other hand, counsel for respondent cite *Davis v. Elmore County*, 9 Idaho, 764, 75 Pac. 910, in support of their position. These cases were both decided by our supreme court, and it is fair to say that each authority, on first reading, appears to support the position taken by counsel citing it. It should be observed, however, that in neither of these cases was the question discussed as to what constitutes an appeal from an order of the board of commissioners. In neither case was the point raised that the making and filing of an undertaking is a jurisdictional matter to be observed by the appellant in prosecuting his appeal in the first instance from the board of commissioners to the district court. The same view here expressed is suggested in *Ravenscraft v. Board of Commissioners*. In *Davis v. Elmore County* the only question considered was the necessity of filing an undertaking on appeal to the supreme court, and anything there said that would indicate that this court considers the giving and filing an undertaking upon appeal from the commissioners to the district court as jurisdictional is merely *dicta*. We want it understood, however, that an appellant cannot be heard to further prosecute his appeal if he fails or neglects to file such undertaking as the district judge may require in any such case. Since we have arrived at the foregoing conclusion, it is unnecessary for us to discuss the sufficiency of the undertaking filed by the appellant in this case in the first instance. After the motion to dismiss had been filed, and after the appellant moved the court to fix the amount of the undertaking to be required, it was the duty of the court to make his order requiring an undertaking sufficient to secure the payment of costs on the appeal, and give the appellant an opportunity to make and file such undertaking.

Having arrived at the foregoing conclusion, it becomes unnecessary for us to consider the point raised by respondent that a surety company bond is not good unless accompanied by evidence showing that the company has qualified under the statute, and is entitled to do such business in the state.

The judgment of the district court will be reversed, and the cause remanded, with directions to the trial court to reinstate the appeal as taken from the board of county commissioners,

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and permit the appellant to file such undertaking for security of costs as the judge of that court shall deem sufficient for such purpose.

Sullivan, C. J., and Stockslager, J., concur.

(December 15, 1904.)

KOOTENAI VALLEY RAILWAY COMPANY v. KOOTENAI COUNTY.

[78 Pac. 1080.]

APPEALS FROM ORDERS OF COUNTY COMMISSIONERS—FILING UNDERTAKING ON SUCH APPEALS NOT JURISDICTIONAL.

1. An appeal from an order of a board of county commissioners is perfected by serving upon the clerk of the board a notice of appeal as required by section 1777, as amended by act of February 14, 1899 (Sess. Laws 1899, p. 248), and the giving and filing an undertaking is not jurisdictional, and the appeal should not be dismissed for a failure to give an undertaking in the absence of an order of the district judge requiring such undertaking.

(Syllabus by the court.)

APPEAL from District Court in and for Kootenai County.
Honorable Ralph T. Morgan, Judge.

The Kootenai Valley Railway Company appealed from an order of the board of county commissioners of Kootenai county and its appeal was dismissed by the district court, from which order and judgment an appeal was taken to this court.

The facts are the same as in the case of *Great Northern Ry. Co. v. Kootenai County*.

M. J. Gordon and Charles A. Murray, for Appellant.

Failure to file transcript within the time prescribed by the rules of the supreme court of this state is ground for dismissal of appeal, and yet, where the appellant was not at fault, the court refused to dismiss an appeal for failure to file the

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transcript, and said: "A rule, or the construction of a rule, which would deprive a party of his right of appeal by reason of the default of an officer of the court solely, would be more than inequitable. It would be arbitrary, tyrannical and unjust, and might be destructive of the end for which courts are established and maintained, . . . the administration of law and justice. . . . Under statutes and rules similar to ours, it has been uniformly held that, while failure to file a transcript is ground for the dismissal of the appeal, a delay may be excused." (*Westheimer v. Thompson*, 3 Idaho, 418, 31 Pac. 797; *Perkins v. Bridge*, ante, p. 189, 77 Pac. 330; *Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327, 20 Sup. Ct. Rep. 906, 44 L. ed. 1088; 2 Ency. of Pl. & Pr. 246.)

T. H. Wilson and Charles L. Heitman, for Respondent, file no brief.

AILSHIE, J.—The facts in this case are identical with the facts as contained in the statement preceding the opinion in the case of *Great Northern Ry. Co. v. Kootenai County*, ante, p. 379, 78 Pac. 1078, decided at this present term, and therefore the judgment of the lower court will be reversed for the same reasons and on the same grounds as given in that case.

The judgment of the district court is reversed and the cause remanded, with directions to the trial court to reinstate the appeal as taken from the board of county commissioners, and permit the appellant to file such undertaking for security of costs as the judge of that court shall deem sufficient for such purpose.

Sullivan, C. J., and Stockslager, J., concur.

Points decided.

(December 16, 1904.)

STATE v. ROOKE.

[79 Pac. 82.]

DEMURRER TO INFORMATION OVERRULED WHEN—APPLICATION FOR CHANGE OF VENUE OVERRULED WHEN—APPLICATION FOR CONTINUANCE OVERRULED WHEN—WHEN NAMES OF WITNESSES MAY BE INDORSED ON INFORMATION—SWEARING ALL WITNESSES IN A BODY NOT ERROR—SUFFICIENCY OF CHANGE OF OWNERSHIP OF PROPERTY—STATEMENT OF PROSECUTING ATTORNEY TO JURY NOT ERROR WHEN—INSTRUCTIONS OF THE COURT SUFFICIENT WHEN—VERDICT SUFFICIENT WHEN—RULE AS TO TESTIMONY OF ACCOMPLICES—PERMITTING LETTER TO GO TO JUROR NOT ERROR WHEN.

1. A demurrer to an information will be overruled when it charges the unlawful and felonious taking of the property from the possession of the owner, naming him, giving a description of the property, fixing time and venue.

2. An application for change of venue will be denied when it is based on the ground of the bias and prejudice of the people of the county, where it is shown that an equal number of the citizens of the county testify that in their opinion a fair and impartial trial can be had in the county.

3. It is not error to overrule an application for continuance when it is not sufficiently made to appear to the court that the evidence of the absent witnesses can be furnished at a future term of the court, or that the testimony of such witnesses is material to the defendant setting out in the affidavit for continuance what defendant expects to prove by such absent witnesses.

4. Names of witnesses may be indorsed on the information at the beginning of the trial when it satisfactorily appears to the court that the prosecuting officer could not reasonably have asked such permission at an earlier time.

5. It is not error to swear all witnesses in a body at the beginning of the trial.

6. When the information charges that the property alleged to have been stolen was the property of C. W. Dunham, the proof shows that Charles Dunham was the owner thereof, and the verdict shows the property to have been that of C. W. Dunham, the variance is not sufficient to warrant a new trial where it does not appear that they are different persons.

7. Erroneous statements of the prosecuting attorney or other counsel on behalf of the prosecution may be explained by the party making them.

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8. When the court trying the case fully and fairly instructs the jury on every question arising on the trial, it is not error to refuse instructions submitted by the defendant or prosecution.

9. Before a party charged with crime can be convicted upon the testimony of accomplices, there must be corroboration of the evidence of such witnesses.

10. Where it is shown that a letter had been given to a juror during the trial or before a verdict had been returned and the court was ignorant of such fact, and it is further shown that on the hearing of the motion for a new trial the attention of the court is not called to such fact, it cannot be urged in this court as a ground for new trial.

(Syllabus by the court.)

APPEAL from the District Court of Idaho County. Honorable Edgar C. Steele, Judge.

Judgment of conviction of grand larceny. Judgment affirmed

The facts are stated in the opinion.

Clay McNamee, M. R. Hattabaugh, A. S. Hardy and C. H. Nugent, for Appellant.

The only evidence offered to show that this animal was ever in the possession of Rooke is the fact that she was placed in a pasture along with horses belonging to Rooke and that Rooke settled the pasture bill. There is no evidence from which it can even be inferred that the defendant ever knew that this animal had been placed in the pasture, or that any horse had been placed there by others who were not the owners of the same. This court has held that where the presumption arising from the possession of stolen property is overcome, the evidence is insufficient to warrant conviction. (*State v. Marquardson*, 7 Idaho, 352, 62 Pac. 1034.) But in the case at bar the state never raised a presumption of guilt. It did prove that the defendant never took the horse, and established a *prima facie* case that it was never in the possession of the defendant, to his knowledge. (*People v. Curran* (Cal.), 31 Pac. 1116.) Where the evidence fails to connect the defendant with the offense charged, the conviction will be set aside. (*State*

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v. Adams, 9 Idaho, 582, 75 Pac. 258; *State v. Nesbit*, 4 Idaho, 548, 43 Pac. 66.) Also where no common enterprise is shown. (*Hilligas v. State*, 55 Neb. 586, 75 N. W. 1110.) In the case at bar the state does not rely upon circumstantial evidence; every detail is sworn to by eye-witnesses. There is no room for the presumptions dealt in where the evidence is circumstantial. It is error to allow a jury to infer a fact of which there is no evidence. (*Saunders v. People* (Mich.), 1 Am. Cr. Rep. 347.) Testimony which raises a mere conjecture ought not to be left to a jury as evidence of a fact which a party is required to prove. (*State v. Carter* (N. C.), 1 Am. Cr. Rep. 444.) Evidence of the perpetration by the defendant of a crime other than that for which he is on trial is not admissible unless such connection be shown between the two offenses as tends to prove that if defendant were guilty of the one, he was also guilty of the other. (*Swan v. Commonwealth* (Pa.), 4 Am. Cr. Rep. 188, and note, p. 190; *People v. Tucker*, 104 Cal. 440, 38 Pac. 195.) On the subject of other thefts in larceny cases see *State v. Kelly* (Vt.), 9 Am. Cr. Rep. 354, and note, p. 361; *People v. Bird*, 124 Cal. 32, 56 Pac. 639. The testimony of the witnesses tending to connect the defendant with the alleged theft, and who swore to the taking of the horse, was testimony of witnesses admitting that they were concerned in the taking, and who were therefore accomplices according to their own claim. There is not sufficient testimony from other persons of material facts to corroborate the testimony of these accomplices. The testimony of accomplices must be corroborated. (*Territory v. Neligh*, 2 Ariz. 69, 10 Pac. 357; *Middleton v. State*, 52 Ga. 527, 1 Am. Cr. Rep. 194; *People v. Kunz*, 73 Cal. 313, 14 Pac. 836.) The courts hold that threats of lynching are sufficient to authorize change of venue. (*Richmond v. State*, 16 Neb. 388, 20 N. W. 282; *State v. Greer*, 22 W. Va. 800.) The courts have also held that newspaper attacks upon the defendant are enough to authorize change of venue. (*Gallaher v. State*, 40 Tex. Cr. Rep. 296, 50 S. W. 388; *State v. Olds*, 19 Or. 397, 24 Pac. 394. See, also, *Meyers v. State*, 39 Tex. Cr. Rep. 500, 46 S. W. 817; *Saffold v. State*, 76 Miss. 258, 24 South. 314; *Jamison v.*

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People, 145 Ill. 357, 34 N. E. 486; *Johnson v. Commonwealth*, 82 Ky. 116; *State v. Spotted Hawk*, 22 Mont. 33, 55 Pac. 1026; *State v. Flaherty*, 42 W. Va. 240, 24 S. E. 885.)

John A. Bagley, Attorney General, for the State.

Swearing witnesses in a body not reversible error. (*State v. Crea*, *ante*, p. 88, 76 Pac. 1013.) Misconduct of county attorney: This is not assigned as a ground for a new trial in the notice and motion for a new trial, and cannot be considered by this court. The conduct complained of is not sufficient to warrant a reversal of this case or bring it within the rule laid down in *State v. Irwin*, 9 Idaho, 35, 71 Pac. 608; *State v. Harness*, *ante*, p. 18, 76 Pac. 788.

STOCKSLAGER, J.—On the eighth day of September, 1903, an information was filed in the district court of Idaho county, charging the defendant, William Rooke, with the crime of grand larceny. After alleging that the defendant had waived a preliminary examination, the prosecuting officer charges the larceny as follows:

1. That the said William Rooke, on or about the twenty-third day of January, 1903, at the county of Idaho, and state of Idaho, then and there being, did then and there willfully and unlawfully and feloniously steal, take, carry, lead and drive away from the possession of one C. W. Dunham, one roan mare, the same then and there being the personal property of said C. W. Dunham.

To this information a demurrer was filed: 1. That said information does not substantially conform to the requirements of sections 7677, 7678 and 7679 of the Revised Statutes; 2. That the facts stated in said information do not constitute a public offense.

This demurrer was overruled, to which counsel for defendant excepted. Counsel for defendant filed a motion for change of venue, which was by the court overruled; all these proceedings were had at the September, 1903, term of the district court of Idaho county. The next step disclosed by the transcript was an application for a continuance on behalf of the defendant, which was filed on the first day of February, 1904, it be-

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ing the first day of the February term of the Idaho county district court. The record shows that this motion was argued and submitted to the court and overruled on the said first day of February, 1904. On the same day it is shown that the prosecuting officer asked to have the names of a number of witnesses indorsed on the information, which was objected to by the defendant. The objection was overruled and the court directed the names of a large number of witnesses to be indorsed on the information. On February 18, 1904, it is shown that the court ordered that a jury be impaneled to try the cause, which was completed, and on the 19th the trial was resumed and continued from day to day until completed. On the twenty-fourth day of February, 1904, the jury returned the following:

“February Term, 1904.

The State of Idaho,	}
Plaintiff,	
v.	
William Rooke,	
Defendant.	}

“VERDICT.

“We, the jury in the above-entitled cause, duly impaneled and sworn, find the defendant guilty as charged in the information.

“HENRY FORSEMAN,
“Foreman.”

On the twenty-sixth day of February, 1904, the defendant was sentenced to serve a term of ten years in the penitentiary of the state of Idaho. This appeal is from the judgment and from an order overruling a motion for a new trial. Counsel for defendant make eighty-six assignments of error, and furnish us a transcript of seven hundred and forty folios. A large number of the assignments of error are based upon the admission of evidence and the instructions of the court given on its own motion.

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The first and fifth assignments of error are based upon the ruling of the court in overruling the demurrer to the information. Counsel for defendant in support of this contention say: "The information does not allege anything more than that the defendant took the roan mare described from the possession of the party and then released it. It does not allege directly that he drove or took the horse, but only that he took it from the possession of this person."

As we construe the language of the information, the defendant is informed that on or about a date named he is charged with having willfully, unlawfully and feloniously stolen, taken and driven away from the possession of the complaining witness, certain personal property, the unlawful taking of which is grand larceny under our statute. This is all the law requires, and the demurrer was properly overruled.

Assignment No. 2 is based on the ruling of the court in refusing to grant a continuance on the application of defendant. The first statement of the defendant in his affidavit for a continuance is, "that he is one of the defendants in the foregoing cause, and he is also defendant in four other causes for alleged horse-stealing now pending in said district court." Then follows an allegation that "on or about the eleventh day of February, 1903, he was charged in the probate court, together with other defendants [naming them] with having stolen a number of horses in said county jointly as one joint act."

"That for some reason or other unknown to affiant all the other defendants excepting Joe Canfield and Richard Tipton have been released from said charge or charges, and affiant is informed and verily believes that the county attorney of said county, and W. N. Scales, the attorney for the private prosecutor herein, have agreed to release said Canfield and Tipton in case they would testify against affiant in this and the other causes named."

He next alleges that about the 1st of February, 1903, he entered into a contract with one James Loe, whereby affiant was to furnish Loe about two hundred head of range horses, but on account of a heavy fall of snow and unusually inclement weather about that time, he was unable to furnish the number agreed

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upon, so he referred said Loe to Joe Canfield and Ellis Crooks. Affiant is informed and believes said Canfield and Crooks agreed to furnish said Loe said number of horses, provided affiant should turn in what horses he then had gathered, amounting to about forty head, and that said Crooks, Canfield and Eller sold to said Loe about one hundred head of range horses under said contract and affiant about forty head. That all of said horses were delivered to said Loe at Cottonwood, Idaho, about the ninth day of February, 1903. That said Loe about the same time procured about twenty-five head of horses from the neighborhood of Ferdinand, Idaho, claiming at the same time that he had purchased the same from Indians. To the foregoing facts Hugh O'Kane and William Robinson would testify if they were present at this term of court, and affiant cannot prove such statements by any other witness or witnesses, excepting James Loe, who, affiant is informed and believes, has been released from the aforesaid charges on a promise to testify against affiant. Therefore, without the presence of said Hugh O'Kane and William Robinson, affiant cannot safely go to trial at this term of court. He further says that "he cannot safely go to trial at this term of court without the presence of Julius Leitch, who, if present, would testify that he was present in Spokane, Washington, at the time affiant was arrested on this and other charges. And when he was arrested all that was said or done by affiant was that when the officers entered his room, he greeted them courteously and said, 'Very well, where do you want me to go?' That affiant was not in any way hiding or endeavoring to keep out of the way of officers and that he never claimed to be the wife of witness Julius Leitch, and affiant at the time he was arrested never stated, 'I guess you have got me for life,' or words to that effect, or, 'I guess you have got me,' and that no other conversation occurred there than aforesaid. That the witnesses William Eller and Ellis Crooks, would, if present, testify that the aforesaid contract was entered into and that they furnished, under said contract, the greatest part of said horses. . . . That in all of said transactions between the parties named and James Loe, Ike Loe, his brother, acted as agent therein." Then follows an allegation that the application is

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not made for delay merely, but that justice may be done in the premises.

In support of this application Clay McNamee makes an affidavit: "That he is one of the attorneys for the defendant. That within three days after said case had been set for trial he caused subpoenas to be issued for the attendance of William Eller, Ellis Crooks and Julius Leitch, and within about three days after procured an indorsement by the judge upon the subpoena issued for the said Leitch requiring his attendance at the trial of this cause. No return has been made upon said subpoena by the sheriff of Idaho county, but affiant is informed by one Godfrey Doust that said Leitch is in jail in Spokane, but will be liberated in a few days, said Leitch being held in said jail on suspicion of having committed a crime; that affiant is fully informed and believes the said Leitch, as soon as delivered, will immediately come to this court as witness for the defendant; that on yesterday J. M. Eller made the statement in open court that his son, William Eller, was in Cottonwood, Idaho, on last Saturday, and affiant is fully informed and believes that the said William Eller is now in Idaho county and that no return has been made by the sheriff showing that said Eller is not now in Idaho county; that the same condition as to the return of the officer is true in reference to the witness, Ellis Crooks, and affiant is fully informed and believes that the said Ellis Crooks is now in Idaho county, Idaho. That some three days ago affiant was informed that Hugh O'Kane and William Robinson were in western Oregon; that immediately thereafter he procured an order of this court requiring the attendance of both of said witnesses at this trial. That from an examination of the files and subpoena in this case, affiant has failed to discover any return by the sheriff of Idaho county in reference to either of said witnesses. That affiant is fully informed and believes and states the facts to be that defendant is poor and unable to pay the mileage and witness fees of either or any of said witnesses, and that owing to that fact he has been unable to ascertain the whereabouts of said witnesses or procure their attendance as witnesses. That the defendant has no other witnesses by whom he can prove the facts alleged in the affidavit

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filed to-day and sworn to by the defendant. That affiant has been continuously engaged in the trial of a criminal cause in the above-entitled court ever since the fifteenth day of February, and at all times both before and after said dates has used every effort possible to procure the attendance of each and all of the witnesses named in the defendant's subpoenas on file in this action, by issuing subpoenas and procuring proper orders of this court and informing the sheriff and his deputies of the whereabouts of said witnesses so far as known to affiant and said defendant. That besides the witnesses herein named, the defendant has issued subpoenas within plenty of time to procure their attendance at this trial, but owing to a mistake of one of the sheriff's deputies said subpoenas have, in all probability, not yet been served upon all of said four witnesses, but affiant has been informed by the sheriff that the deputy who went to serve said four witnesses will probably be in Grangeville this afternoon and ready to make return upon said subpoenas. That defendant at this time cannot safely go to trial without the attendance of said witnesses, and affiant is unwilling to disclose to the state what will be their evidence until it can be ascertained whether or not said witnesses have been subpoenaed or a return made."

To this application for a continuance a counter-showing was made by the affidavit of Edward M. Griffith, the county attorney, to wit: "That he is, and for some time past has been, personally acquainted with the alleged witnesses mentioned in said affidavit, to wit, Hugh O'Kane and William Robinson; that said Hugh O'Kane up to a month or two ago conducted a saloon in the city of Grangeville, Idaho, and the said William Robinson was bar-keeper therein and performed other services for said O'Kane. That from the affidavit of the defendant, no time or places being given or any other information upon which this affiant could get at the facts, this affiant is unable to see how any testimony of the said Robinson or O'Kane would be competent or material. That one G. A. Doust, head jailer in the Spokane jail in Washington, in which city this defendant was first arrested on charge for which he has been informed against in the above-entitled action, and which said Doust has been

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brought here by the defendant as a witness for the defendant, as this affiant is informed and believes, and who was present when the said arrest of said Will I. Rooke was made, can and will testify in regard to the transactions which happened at the time of said arrest, as this affiant is informed and believes. That the said G. A. Doust has told this affiant this morning that he was head jailer in the Spokane jail; that when he left Spokane the said Julius Leitch was confined in said jail on the charge of highway robbery, although he, the said Doust, believed that said Leitch would be discharged, or was discharged, by this time.

"That this affiant has examined the records in the probate court where a complaint was filed against the said Ellis Crooks, mentioned in defendant's affidavit, and the record shows that on February 1, 1903, a complaint was filed in that court charging said Crooks with grand larceny, and that a warrant was issued thereon, and that said charge is now pending, and that said matter has never been dismissed and the reason that said Crooks has never had an examination, as this affiant is informed and believes, is because said Crooks ever since the filing of said complaint, has been and now is a fugitive from justice. That there is now on file with the clerk of the above-entitled court a subpoena issued in behalf of the defendant for said William Robinson and Hugh O'Kane, dated the tenth day of February, 1904; that this cause was set for trial on the third day of February, to be tried February 11, 1904. That this affiant is informed and believes that both the said Hugh O'Kane and William Robinson are now residents of the state of Idaho. That at the last term of court the alleged witnesses, Hugh O'Kane and William Robinson, were both residents of this county and in the city of Grangeville, as this affiant remembers, and could easily have been had as witnesses in this case, but after the case was set for trial at said last term, the defendant broke jail, and escaped from the custody of the officers, and was not recaptured until after the expiration and adjournment of said last term of this court."

This constitutes the record before the trial court on this application for a continuance, and for the reason that counsel for

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defendant (appellant) insist with so much earnestness that the court erred in not granting the continuance, we have deemed it best to disclose the entire showing. Applications of this character are addressed to the sound discretion of the trial court, and unless it appears from the record that that court has in some manner abused such discretion, this court will not interfere with its rulings or orders. A careful inspection of the showing made by the defendant as well as the counter-showing of the prosecution does not convince us that the court was in error in its ruling. It is not made to appear that the defendant was entitled to a continuance on account of absent witnesses, whose attendance he could not have procured with due diligence so far as it seems it would not have been in the power of the defendant to procure their attendance at any time in the future. It seems from the showing or counter-showing that one of the witnesses (Leitch) was in the jail at Spokane, the witness Crooks was fugitive from justice, O'Kane and Robinson were, or shortly prior thereto had been, residents of the county of Idaho. The other four witnesses mentioned in the affidavit of Mr. McNamee, whose names are not given, are supposed at the time of the filing of the application, to be residents of Idaho county. What defendant or his counsel expect to prove by these witnesses is not disclosed in the showing, hence the trial court was unable to determine the importance of their evidence or the necessity of their presence on behalf of the defendant as witnesses. It is fair to presume that the application of defendant for a continuance did not impress the trial court with much favor when it is remembered the defendant had escaped from the custody of the officers at a former term of the court, when it is shown that the two witnesses, O'Kane and Robinson, were residents of Grangeville.

We find no error in the ruling of the court in refusing to sustain defendant's motion for a continuance. We have examined *Lillienthal & Co. v. Anderson*, 1 Idaho, 673. In this case, it was shown that the witness was on very friendly terms with the defendant. The evidence expected to be obtained from such witness was set forth in the affidavits, and it was material on the issue of partnership. A subpoena had been issued for the

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defendant and returned not served by the sheriff; a second subpoena was placed in the hands of the sheriff for service with like results. The case was set on the first day of the term, March 7, 1876, for March 11th. It seems immediate steps were taken to procure the attendance of the witness, and this was the first term of the court at which the case was at issue. In *People v. Lee* (Cal.), 8 Pac. 685, the syllabus says: "It is error in a criminal trial to refuse the defendant a continuance asked for on the ground of absence of witnesses from the county where, from the uncontradicted affidavits of the defendant, it appears that such witnesses were regularly subpoenaed, that the facts which the defendant expected to prove by them and which are stated in the affidavit are material to the defense."

In *State v. Lund*, 49 Kan. 580, 31 Pac. 146, it seems the defendant was charged with a violation of the prohibition laws of the state of Kansas. An affidavit for continuance was made with the evidence of the absent witnesses set out in the affidavit. The prosecution agreed to treat the statement in the affidavit as the evidence of the absent witnesses; a trial was had, but the jury failed to agree. A second trial was ordered and the court refused to require the prosecuting officer to treat the statement in the affidavit as evidence of the absent witnesses on the second trial. This the court held was error. We do not think the case at bar falls within the rule laid down in either of the cases above cited and to which our attention is called by counsel for appellant.

In assignment No. 3 it is argued that the court erred in permitting the names of a number of witnesses to be indorsed on the information at or about the time of the commencement of the trial. It seems that the defendant, prior to the date of filing the information, waived a preliminary examination, and only the name of C. W. Dunham was indorsed on the information at the time of filing. The next step taken as shown by the record was the plea of not guilty, entered on September 12, 1903. Next follows an application on behalf of defendant for the court to fix and reduce amount of bail and which was argued and submitted to the court and taken under advisement; this was September 24, 1903.

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Next we find an application for a change of venue, which was overruled by the court. The next mention of this case is dated October 6, 1903. "In the two causes, the defendant, William I. Rooker, having on September 30, 1903, escaped from the sheriff, the said causes are postponed." We find no other steps taken in this case until the February term, 1904. We find the application for a continuance was denied on the eighteenth day of February, 1904, and thereafter the prosecuting attorney asked permission to place the names of a large number of witnesses on the information, which was granted by the court. It does not appear that the defendant thereafter renewed his application for a continuance on the ground that he could not be prepared to meet the evidence of these witnesses, his application being based on the ground alone of the absence of witnesses on his own behalf.

In *State v. Wilmbusse*, 8 Idaho, 608, 70 Pac. 849, this court held that it was not error to allow the names of witnesses to be indorsed on the information even after the trial began, if it was shown that at the time the information was filed the names of such witnesses were unknown to the prosecuting officer. Again, in *State v. Crea*, ante, p. 88, 76 Pac. 1013, this court said: "Under the provision of laws of the Fifth Session of 1899, page 125, section 2, requiring the prosecuting attorney to indorse on the information the names of all the witnesses known to him at the time of filing the same when it is sought to have the names of other witnesses indorsed on the information after the same has been filed, the court must be satisfied that the names of such witnesses were not known to the prosecuting attorney at the time the information was filed, before such names are allowed to be indorsed thereon."

In *People v. Hall*, 48 Mich. 482, 42 Am. Rep. 477, 12 N. W. 665, the court said: "The court allowed the names of several witnesses to be added to the information during the trial, under objection, without any showing that they were not known earlier and in time to give defendant notice in season to anticipate their presence before the trial. The statute is explicit that this shall be done before the trial where witnesses are known." The defendant Hall was charged with the murder of his wife by

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poison. Two of the witnesses whose names were added to the information were doctors. The court further says: "It appears by the testimony of Drs. Prescott and Buffield that they were employed by the prosecution about three months before the second trial, and it appeared further that their testimony was the chief testimony, and practically the only testimony tending to show arsenic in the body. The others were of less consequence."

It is thus shown that defendant was being tried the second time for the murder of his wife and that three months before the second trial, the two doctors had been employed by the prosecution to make an examination of the body, and upon such examination discovered arsenic in the body. There can be no question but that the prosecuting officer knew the importance of the evidence of the two doctors before the trial began and should have procured an order from the court to place such names on the information prior to the commencement of the trial. In the case at bar we find indorsed on the information at the time it was filed, to wit:

"Names of all witnesses known to said prosecuting attorney at the time of filing this information.

"G. W. DUNHAM."

At the time the county attorney asked permission to indorse the names of additional witnesses on the information, the following proceedings were had:

"Mr. Griffith: I desire to have a list of witnesses indorsed on the information. I will state this: that what might seem to be an oversight in not having this done before, is due largely to the unsettled facts and circumstances surrounding the trial of this case. It was uncertain at the beginning which one of these cases would be tried.

"The Court: How many cases?

"Mr. Griffith: Five cases; and then at that time, or what might have been the proper time to have asked this, for these indorsements, the names of all of our witnesses were not known, or a great many of whom have come to our knowledge since this case was set down.

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"The Court: How many witnesses have you indorsed there?

"Mr. Griffith: All of them practically, except the prosecuting witness, only the one. I will say this: There was no preliminary examination had in the case, the defendant waived examination and the only witness who was indorsed was the complaining witness at the preliminary hearing, and that accounts for the fact that most of our witnesses were not indorsed upon the information.

"Mr. Scales: I will state in addition, that all these witnesses, I do not think with a single exception, were known to the defendant. They had the same source of getting it that we did; that was the evidence in the other cases, and in a great many cases. Most all of them had been subpoenaed by the defendant himself, so it is no surprise or anything of the kind."

Counsel for application objected to indorsing any names on the information, alleging surprise. This objection was overruled by the court and the names of witnesses were indorsed on the information by order of the court.

We think under the peculiar facts shown to have existed in this case, together with other cases pending in the court against the defendant, there was no error in the ruling of the court permitting the names to be indorsed.

The fourth assignment argued by counsel for appellant relates to the court ordering that all witnesses for the prosecution be sworn in a body. This practice is quite common in the trial courts of the state, especially where there are a large number of witnesses in attendance at the commencement of the trial, and we know of no statute or rule of the courts prohibiting it; hence we find no error.

In assignment No. 7, counsel for appellant says: "Witness Canfield shows by his own testimony that he stole the animal described under the information, and that he was testifying under threats of prosecution if he did not implicate the defendant, and under promises of release if he would do so. The testimony of a witness who is testifying under threats of prosecution is open to the grossest objection." This argument might

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appeal to the justice, conscience and even sympathy of the jurors, but after it has passed them unheeded as well as the trial court on defendant's motion for a new trial without beneficial results to defendant under repeated discussions of this court, it will not reverse the judgment on appeal.

Another assignment of error is the refusal of the court to grant a change of venue. Counsel for appellant with energy, ability and earnestness insist that with the showing made of the bias and prejudice of the people of Idaho county, against defendant, he was entitled to have the case removed to another county, in the second judicial district, for trial. We have read the affidavits in support of this application, as well as those opposing it, with much interest and care. It seems that an organization exists in that county known as the "Idaho County Stock Association," the object and purpose of which is to protect their stock from larceny, and that such organization, through the medium of the newspapers of that section of the county, and otherwise, has published its willingness to pay a reward of \$300 for the arrest and conviction of anyone charged with such crime. It also appears that this organization employed W. N. Scales to assist the county attorney in the prosecution of this action.

It is shown by the affidavit of the defendant, Clay McNamee, one of his attorneys, that this organization has about three hundred members, and whilst it is not shown by the record, we take judicial knowledge of the fact that Idaho county cast about four thousand five hundred votes at the last general election, being about one member of this organization to fifteen electors in that county, so far as interpreted by the courts. These organizations exist in many counties of the state under different names, are organized for the purpose of protecting personal property—especially livestock—from theft. It is certainly the privilege of good citizens to thus band themselves together for the universal protection of this property, and if the organization of such an association in a county where livestock raising is one of the principal industries is to be ground for a change of venue in cases where the parties are charged with the larceny of livestock, then the very object and purpose of the organization is to be thwarted by the law as interpreted by the courts.

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We do not wish to be understood as holding that a change of venue should not be granted in some instances. It is frequently necessary that justice may be done, but in this case we find a large number of citizens of that county testifying that in their opinion, which is based on common rumor and frequent conversations with the citizens of the county, the defendant cannot have a fair and impartial trial; on the other hand, an equal number, and, so far as we are informed, equally as good citizens, testifying that in their opinion there is no necessity for the change, and that from their conversations and acquaintance with the people of that county, the defendant can have a fair and impartial trial. All this evidence, as well as many facts that we apprehend are not shown by the record, were before the learned trial judge, and, in the discharge of his duties, he refused to grant the motion for change of venue, and we find no error in such ruling.

Another assignment upon which appellant relies is based upon the fact that the information charges that the animal alleged to have been stolen was the property of G. W. Dunham, when, in fact, it belonged to Charles Dunham.

State v. Rice, 60 Kan. 868, 63 Pac. 737, is cited in support of this contention; the syllabus says: "Where property stolen belonged to one S., but the ownership was alleged in one B., and the evidence showed that the latter had charge of it as the servant of S., and had no other interest in it, a conviction for larceny from B. cannot be sustained." This case has no application to the facts of the one under consideration. It is nowhere shown that C. W. Dunham is not Charles Dunham, but it is shown by the evidence of Charles Dunham that the roan mare, alleged to have been stolen, was his property.

In *State v. Ireland*, 9 Idaho, 686, 75 Pac. 257, recently decided by this court, involving a question similar to this, it is said: "Where the information avers the title to stolen property in B., and the evidence shows that B. and J. are the owners thereof, the variance between the averment and proof is not fatal. (Overruling *People v. Frank*, 1 Idaho, 200." We do not think the variance in this case is fatal.

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The next assignment of error urged by counsel for appellant to which we shall direct our attention relates to certain statements made by W. N. Scales in his closing argument to the jury on behalf of the prosecution. It follows: "From my standpoint, looking at the testimony as I do, if a juror under this evidence can say that the defendant is not guilty, he is influenced by something other than the testimony he has heard."

"Mr. McNamee: The defendant desires an exception to the statement of counsel.

"The Court: Certainly, the counsel does not mean to say that any juror has been improperly influenced.

"Mr. Scales: No, sir; I mean nothing of that kind. Gentlemen, when I examined you as to your qualifications to act as jurors, I asked each and every one of you whether, if the defendant's wife and two small children were brought into the courtroom during this trial, you would allow your sympathy for the wife and children to unduly affect you in arriving at your verdict; whether you would allow your sympathy to cause you to find the defendant not guilty, if the evidence found him guilty; and each and every one of you said you would not; and what I mean is that you should not let your sympathy alone cause you to find the defendant not guilty, but should be governed entirely from the evidence. I did not intend to impute improper methods to anyone."

Again, in the same argument, and immediately following the above language, Mr. Scales made use of the following language: "I want you to give this defendant justice, and justice is what this defendant does not want." Again, immediately following the last quoted language, the following language is credited to Mr. Scales: "Mr. Moore had said in his argument to you that he desired you to consider him as a thirteenth juror, and asked you to consider him as such. I am willing to accept Mr. Moore as a juror, and from the evidence in this case he would find the defendant guilty." We will dispose of these statements in the order named.

The first statement, in our view, was improper, but after the suggestion of the court, we think Mr. Scales placed himself in

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a proper position before the court and jury. He suggested to the jury that the idea he meant to convey was that they were not to be influenced by any feeling of sympathy for the defendant, or his wife and two small children, and disclaimed any intent to impute improper motives or influence to any of the jurors. The next statement is merely the conclusion of counsel, and was his way of expressing his belief in the guilt of the defendant.

The next statement seems to have been called for in the estimation of counsel by what was said by Mr. Moore in his argument to the jury in behalf of defendant. It does not appear that the jury took Mr. Moore into their confidence sufficiently to make him the thirteenth juror. We are not informed as to whether Mr. Scales' confidence in him as the thirteenth juror was ill-advised, or otherwise. None of these statements fall within the rule laid down in *State v. Irwin*, 9 Idaho, 35, 71 Pac. 608, or *State v. Harness*, *ante*, p. 18, 76 Pac. 788.

Counsel for appellant base a number of assignments of error on the instructions given to the jury by the court on its own motion. We have carefully considered all the objections of counsel, and conclude that the defendant has no reason to complain of any of the instructions. The court fully and fairly instructed the jury on all questions of law arising on the trial of the case, and we find none that were misleading or ambiguous. When this state of facts appears from the record, it is not error for the court to refuse instructions offered by counsel for either the prosecution or defense.

Assignment No. 80 is based on the verdict as returned by the jury. It is shown by the record that in the beginning of the trial all proceedings were ordered to be in the name of William I. Rooke; the verdict is returned against William Rooke. There is no pretense that William Rooke and William I. Rooke is not one and the same party against whom the information was filed, and who was found guilty of larceny of the animal in controversy. It is insisted that the verdict should have been sent back to be corrected before being received, and failure to do so was error. It would perhaps have been better

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practice to have had the verdict corrected, but we cannot agree with counsel's contention that it was error not to do so.

Many exceptions were taken to the ruling of the court on the admission of evidence of accomplices. Also as to other charges of larceny against the defendant. It seems that other charges of larceny were so closely interwoven with the one from which defendant was being tried that the court admitted some evidence as to other crimes. The court fully instructed the jury as to their duties with relation to both of these matters, and we think made it plain to them that defendant could only be convicted for the larceny of the animal alleged to have been stolen, and as charged in the information; also that the testimony of accomplices must be corroborated by some fact or circumstance before a conviction can be had.

This brings us to an important, as well as an unfortunate, condition of this case as shown by the record and the certificates of the learned judge who tried the case and settled the statement.

At folio 619, we find the following statement: "And be it remembered, that after the jury had retired to consider of their verdict, and before they had arrived at or returned their verdict into court, that a sealed letter was handed to the bailiff by some bystander, or stranger to the court, for the juror, J. D. Knorr, and was by the said bailiff handed to the said juror who retained and read the same, all before the verdict of the jury was returned or rendered; and that the said letter was not read by the court nor the defendant or his counsel, or submitted to either of them, nor did the defendant assent to the said letter being delivered to the said juror."

At the time of the hearing of this case at the last term of this court at Lewiston, Honorable Edgar C. Steele, judge of the second judicial district, filed the following certificate: "I, Edgar C. Steele, judge of the second judicial district of the state of Idaho, hereby certify that I am the judge who tried the above cause in Idaho county, state of Idaho, and certify to the statement of the case and bill of exceptions on motion for a new trial, as being true and correct, and that I have this day

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examined the record in the above case as filed in the supreme court, and I find the following contained therein." (Here follows the statement purporting to be a part of the bill of exceptions and copied in full above.)

"I hereby certify that the said above quoted matter is false and untrue, in so far as any information of the district court is concerned, and was inserted in the record without my knowledge, assent or approval, and that the said statement and bill of exceptions, when signed, were not known to me to contain the foregoing quoted matter, and that I have no information or knowledge that any letter was referred to as having been delivered to the jury at any time until yesterday, the eighteenth day of October, 1904.

"I make this additional certificate in the interest of justice and good practice, and in order that your honorable court may strike the same from the statement, or take proper steps to have the statement and bill of exceptions corrected, in order that you may have a true statement and bill of exceptions before you in the hearing of this important case. I further certify that upon the motion for a new trial the same was never called to my attention, nor assigned as a reason for granting said motion, and that the same was never brought to my attention until the time hereinbefore stated."

It was admitted on the hearing of this case in this court by counsel for appellant that the letter was an unimportant one from the wife of the juror, and only related to some family matters, and the fact that the coyotes were killing the chickens, and as I now remember it, urging him to come home as soon as possible.

In our view of the case, it matters not what the letter may have contained, for the reason that the motion for a new trial did not call attention to the fact that this letter had been permitted to pass into the hands of one of the jurors, and an assignment of error urged upon the trial court by reason thereof, and be given an opportunity to investigate the facts in the case as to this letter. In all fairness to the trial courts, they should be given an opportunity to pass upon every question that is to

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be presented to this court. Our attention is called to *State v. Bland*, 9 Idaho, 796, 76 Pac. 781. We do not wish to retract anything said in that opinion, but the facts were altogether different in that case from the one at bar. It was shown by the record in the Bland case that the letter was handed to the judge, and by him passed to the juror. There was a showing made on behalf of the state that one of the attorneys for the defendant consented to the delivery of the letter to the juror, but this was contradicted by the defendant and his attorney, and this court said it was error to allow the letter to go to the juror under the showing.

We find a difference in the authorities on the question under discussion, some saying that if it was shown that a letter has been allowed to go to a juror, it devolves upon the prosecution to show that the contents were of such a character that they did not in any way relate to the case; whilst others hold that it is error to permit a letter to go to a juror, no difference what its contents may be.

We wish to be understood in this case as placing our ruling entirely on the ground that the trial court was ignorant of the fact that a letter had been given to a juror at any time during the trial, or before a verdict was returned by the jury; and further, that in the presentation of the motion for a new trial, the court's attention was not called to the existence of such fact.

We have carefully examined all the assignments of error, and in our view of the case it is unnecessary to pass upon any excepting those set out in this opinion. Many conditions arise in this case that are unusual in the criminal practice. We have set out in full the facts in many instances for the reason that courts are not frequently called upon to decide cases where so many complications arise, especially under conditions that exist in this case.

We have concluded that the motion for a new trial was properly overruled, and that the judgment in this case should be affirmed, and it is so ordered.

Sullivan, C. J., and Ailshie, J., concur.

Argument for Appellant.

(December 17, 1904.)

STATE v. LANCASTER.

[78 Pac. 1081.]

PROSECUTION FOR RAPE—CHARGE OF SINGLE OFFENSE—PROOF OF OTHER RAPES ON PROSECUTRIX—ADMISSIBLE WHEN CORROBORATIVE OF PROSECUTRIX—ELECTION BY STATE.

1. The general rule in criminal cases is that where one specific offense is charged, the commission of other offenses cannot be proven for the purpose of showing that the defendant would have been more likely to have committed the offense for which he was on trial, nor as corroborating the testimony relating thereto. But there are some exceptions to this general rule, and where the offense consists of rape upon a female under the age of consent, evidence of previous acts occurring prior to the offense alleged is admissible as having a tendency to render it more probable that the crime charged was committed, though evidence of such crimes would be inadmissible as independent testimony.

2. The proof of other rapes on the prosecutrix than the one charged in the information is not admissible for the purpose of proving this distinct offense, but to show the relation and the familiarity of the parties and as corroborative of the prosecutrix's testimony concerning the particular act relied upon for a conviction.

3. In this class of cases where several crimes of the same kind may be proved, the state must elect on what particular offense it will stand, and the jury must be informed for what offense a conviction is demanded.

(Syllabus by the court.)

APPEAL from District Court of Idaho County. Honorable Edgar C. Steele, Judge.

Prosecution for statutory rape. Defendant convicted. Judgment affirmed.

Clay McNamee and M. R. Hattabaugh, for Appellant.

The information in this case charges the defendant with but one act of sexual intercourse with the prosecutrix, alleged to have taken place on or about the tenth day of June, 1902. The evidence introduced by the state over the strenuous objection

Argument for the State.

of the defendant's counsel shows, or tends to show, the perpetration of two other separate and distinct acts of rape committed by the defendant upon the prosecutrix at periods of time antedating the date alleged in the information for more than one year. The defendant came into court for trial, as he and his counsel supposed, to meet but the single charge named in the information, and was compelled, under the ruling of the court, to meet three separate and distinct charges, in which he was taken by surprise and could not successfully prepare his defense. Who can say whether or not the defendant was found guilty upon the charge as set out in the information or upon one or both of the other acts allowed in evidence before the jury? On this particular phase of this case, we submit the following well-considered authorities: 23 Am. & Eng. Ency. of Law, 2d ed., p. 881; *People v. Stewart*, 85 Cal. 174, 24 Pac. 722; *People v. Bowen*, 49 Cal. 654; *Janzen v. People*, 159 Ill. 440, 12 N. E. 862; *State v. Bonsor*, 49 Kan. 758, 31 Pac. 736; *State v. Masteller*, 45 Minn. 128, 47 N. W. 541; *Owens v. State*, 39 Tex. Cr. Rep. 391, 46 S. W. 240; *Parkinson v. People*, 135 Ill. 401, 25 N. E. 764, 10 L. R. A. 91; *Snurr v. State*, 2 Ohio Cir. Dec. 614. In exceptional cases, the doctrine laid down in these decisions is relaxed and evidence of other similar acts become admissible, but only for the purpose of showing intent, but that exception has been held in cases of this kind in California not to apply. Had the information contained three different counts, even then the state would have been properly required to elect upon which charge it would stand and rely for a conviction, and where evidence had been introduced showing more than one act, the authorities hold that the state must then elect on which act it will rely for conviction. (*People v. Williams*, 133 Cal. 165, 65 Pac. 323; *People v. Castro*, 133 Cal. 11, 65 Pac. 13; *State v. Hilberg*, 22 Utah, 27, 61 Pac. 216; *State v. Stevens*, 56 Kan. 720, 44 Pac. 992.)

Attorney General John A. Bagley, for the State.

The only point argued by counsel for appellant was that the court erred in admitting evidence of former acts of sexual intercourse between the parties. This is always admissible in

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this class of cases. (*Commonwealth v. Merriam*, 14 Pick. 518, 25 Am. Dec. 420; *People v. O'Sullivan*, 104 N. Y. 481, 58 Am. Rep. 530, 10 N. E. 880; *State v. Marvin*, 35 N. H. 22; *State v. Wallace*, 9 N. H. 515; *State v. Knapp*, 45 N. H. 156; *Strang v. People*, 24 Mich. 1, cases cited in note on page 2; *Sharp v. State*, 15 Tex. App. 171; *State v. Way*, 5 Neb. 287; *Thayer v. Thayer*, 101 Mass. 112, 100 Am. Dec. 110; *State v. Raymond*, 53 N. J. L. 260, 21 Atl. 328; *Bottomley v. United States*, 1 Story, 135, Fed. Cas. No. 1688.)

SULLIVAN, C. J.—The appellant was convicted of the crime of statutory rape, and sentenced to a term of six years in state's prison. The first error assigned is that the court erred in failing to require the clerk to state the plea of the defendant to the jury. While the record and the notes of the stenographic reporter do not show that the defendant's plea was stated to the jury, we have before us the affidavit of the stenographic reporter, in which he says: "That as soon as the jury were sworn and impaneled in the said cause, the clerk of said court, under the direction of the court, read to the jury the information in the said cause, and immediately thereafter stated to the jury that the defendant pleaded not guilty." Also in the first instruction given to the jury by the court, the court there states that the "defendant pleads not guilty" to the information. For that reason the case of *State v. Chambers*, 9 Idaho, 673, 75 Pac. 274, is not in point, as in that case there was no showing whatever that the plea was stated to the jury, and it was admitted that the plea was not stated to the jury. If the plea was in fact stated to the jury, and the stenographer's notes do not show that fact, it may be shown by the affidavit. The record may be made to speak the truth.

Counsel for appellant contend that the court erred in the admission and rejection of certain testimony, specifying the same, and contended that the information charges the defendant with having committed the rape, of which he was found guilty, to have taken place on or about the tenth day of June, 1902, and that the evidence introduced by the state over the strenuous objection of defendant's counsel, shows, or tends to show, the

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perpetration of two other separate and distinct acts of rape committed by the defendant on the prosecutrix at periods of time antedating the date alleged in the information, one for more than a year, and the other nine months, and that the admission of the proof thereof was error.

The record shows that after the complaining witness had testified that the rape was committed on the ninth day of June, 1902, she was permitted to testify, under objection, to two other acts of rape upon her, one occurring in May, or June, 1901, and the other in September, 1901.

The general rule is that a crime distinct from that laid in the information cannot be given against the prisoner, but there are exceptions to that rule. The general rule is based upon the principle that the commission of an independent offense is not in itself proof of the commission of another crime—the one for which the defendant is prosecuted. Cases, however, occur where the crime charged in the information is so connected with the crime, proof of which is sought to be introduced, that the existence of the one tends to establish the existence of the other, and that is the reason on which the exception to the general rule is based. (23 Am. & Eng. Ency. of Law, 2d ed., p. 248.) But the courts are not agreed on the terms or the extent of the exceptions to the general rule, and it is stated at page 249 of the authority above cited, as follows: "Many of the exceptions, however, are old and well fixed, and courts take their stand on these established exceptions, and will not allow the introduction of evidence of independent offenses unless the particular instance can be shown to fall under one of these recognized cases." And the author there states that a good deal appears to rest on the discretion of the judge as to whether such a connection between the crimes is shown as to warrant its introduction.

While there is a conflict in the decisions upon the point under consideration, it appears to us that the rule established by the decided weight of recent authority is that crimes involving illicit sexual intercourse of any sort constitute an exception to the general rule. (Underhill on Criminal Evidence, sec. 92.)

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While some of the cases hold that acts both prior and subsequent to the one set forth in the indictment may be given in evidence, others hold that only those acts occurring prior to the act charged can be given, and those instances not to be too remote in time from the one charged. In the case at bar, it will be observed that one of the acts testified to occurred about a year prior to the one charged in the information, and the other about nine months.

In Wharton's Criminal Evidence, eighth edition, section 35, it is said: "In prosecutions for adultery, or for illicit intercourse of any class, evidence is admissible of sexual acts between the same parties prior to, or, when indicating continuousness of illicit relations, even subsequent to the act specifically under trial." (See Underhill on Criminal Evidence, sec. 383; *State v. Witham*, 72 Me. 531; *People v. Castro*, 133 Cal. 11, 65 Pac. 13; *State v. Hilberg*, 22 Utah, 27, 61 Pac. 215.)

In *State v. Knapp*, 45 N. H. 156, the court having cited other decisions bearing upon the point under consideration, said: "The principle of these cases, we think, must govern the one before us—that is, the solicitations of the respondent evince a state of mind that renders the act charged more probable. It is true that it does not necessarily evince a disposition to accomplish his object by force; but it tends to show that all other restraints had been thrown off, and that a lustful intent toward the prosecutrix existed in the heart of the prisoner, which would render the commission of the crime more probable."

In *State v. Robinson*, 32 Or. 43, 48 Pac. 357, the court said: "It is next insisted that the court was in error in allowing the prosecution to give evidence tending to show more than one act of criminal intercourse between the defendant and the prosecutrix. . . . As a general rule, the principle invoked is unquestionable, although there are in fact many exceptions which it is unnecessary to attempt to point out at this time, as authorities fully sustain the competency of the evidence offered and admitted in this case, not for the purpose of proving a different offense, but to show the relation and familiarity of the parties, and as corroborative of the prosecutrix's testimony concerning

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the particular act relied upon for the conviction." (*People v. Abbott*, 97 Mich. 484, 37 Am. St. Rep. 360, 56 N. W. 862; *People v. O'Sullivan*, 104 N. Y. 481, 58 Am. Rep. 530, 10 N. E. 880.)

It is contended that the state did not elect upon which act of rape it relied for a conviction in this case, and that was error. It appears from the record that the prosecutrix when placed upon the stand testified, first, as to the act that occurred on June 9, 1902, and thereafter counsel for the prosecution asked the prosecutrix the following questions: "Q. I will ask you, Stella, how many times this defendant had intercourse with you?" Thereupon counsel for the defendant objected to said question as incompetent, irrelevant and immaterial and not proper evidence, and stated, "We are not charged with but one specific act under the information. Other acts are not admissible in evidence." Thereupon the assistant prosecutor stated: "It is not offered for the purpose of showing separate and distinct offenses, but to corroborate the testimony." Thereupon the objection was overruled and the prosecutrix answered as follows: "A. Three times." And then proceeded to testify where and when each of said acts occurred.

It will appear from the above that the state did select the act alleged in the information as occurring about June 10, 1902, and the one testified to by the prosecutrix as having occurred on June 9th as the one for which, or on which, the defendant was being prosecuted. The assistant prosecuting attorney stated that the other acts were only introduced in corroboration. We think that selection sufficient and the jury certainly understood for what specific act the defendant was being tried. It certainly would not be fair to the defendant to charge him with a crime as having been committed on a certain date and then to introduce proof of three crimes of the same class or kind, of different dates, and not require the state to select the one on which the conviction was sought.

In this case when the trial began the defendant was expected to meet the specific act charged in the information, and it would be most unfair to require him to defend against two other acts occurring, one nine months and the other over a year, prior to

Points decided.

the date of the one alleged in the information. If the state were not required to elect on which act a conviction was demanded, the question as to whether the jury united in a verdict upon any one act would be problematical.

Some of the members of the jury might have concluded that defendant was guilty of the act testified to as having occurred in May or June, 1901, and not of the act alleged in the information as having occurred on or about June 10, 1902; and others might have concluded that he was guilty of the act charged in the information, and not guilty of the act testified to as having occurred in May or June or September, 1901.

It will thus be observed that in the class of actions where other offenses of the same class may be testified to under the exceptions above noted, the state must elect and the jury must be informed of the act for which a conviction is demanded. A selection was made in this case.

We have examined the other errors assigned based on the admission and rejection of testimony and find no error in the rulings of the court thereon. We have also carefully examined the instructions given by the court, and find that they fairly present the law as applied to the facts established by the evidence.

After a careful examination of each of the errors assigned, and finding no error in the record, we conclude that the judgment must be affirmed, and it is so ordered.

Stockslager and Ailshie, JJ., concur.

(December 27, 1904.)

KURDY v. ROGERS.

[79 Pac. 195.]

SPECIFIC PERFORMANCE—INSUFFICIENCY OF WRITTEN MEMORANDUM.

1. A receipt or memorandum in the following language: "Lowe, Idaho, March 17, 1902. Received from S. C. Kurdy, one hundred and ninety dollars on land, Sec. 25, Ts. 32 R. 2 E. 160 acres," signed by the parties sought to be charged, *held* insufficient upon which to enforce specific performance.

(Syllabus by the court.)

Argument for Appellant.

APPEAL from District Court, Idaho County. Honorable E. C. Steele, Judge.

Judgment for defendants, from which plaintiff appeals. Affirmed.

The facts are stated in the opinion.

R. F. Fulton, for Appellant.

When no sufficient evidence has been adduced by the plaintiff to justify the jury in finding a verdict in his favor, the court may order a nonsuit. But where there is any evidence for the plaintiff, it is improper to grant a nonsuit, and to the plaintiff's evidence must be given the most favorable construction. (16 Am. & Eng. Ency. of Law, pp. 741-742.) A nonsuit will not be granted where the evidence offered tends to show facts sufficient to support the action, although remotely. (*Foster v. Dixfield*, 18 Me. 380; *Page v. Parker*, 43 N. H. 363, 80 Am. Dec. 172; *McKee v. Greene*, 31 Cal. 418.) Or where there is any evidence at all for the plaintiff proper to go to the jury. (*Black v. Lewiston*, 2 Idaho, 276, 13 Pac. 80.) The grounds upon which a motion for nonsuit is based must be precisely and specifically stated in the motion at the time it is made. (6 Am. & Eng. Ency. of Law, 1st ed., p. 878.) The grounds stated are conclusive upon the applicant both in the trial and the appellate court, and the defendant cannot raise for the first time upon appeal a ground of nonsuit not stated below. (6 Am. & Eng. Ency. of Law, 1st ed., p. 879; *Flynn v. Dougherty*, 91 Cal. 669, 27 Pac. 1080, 14 L. R. A. 230.) A contract for the sale of lands may be gathered from a number of writings, letters or other memoranda. (*White v. Breen*, 106 Ala. 159, 19 South. 59, 32 L. R. A. 127; *Rutenberg v. Main*, 47 Cal. 213; *Sanders v. Pottlitzer Bros. Fruit Co.*, 144 N. Y. 209, 43 Am. St. Rep. 757, 39 N. E. 75, 29 L. R. A. 431; *Salmon Falls Mfg. Co. v. Goddard*, 55 U. S. (14 How.) 447, 14 L. ed. 493; *Pomeroy's Specific Performance*, secs. 81-84; *Louisville Asphalt Varnish Co. v. Lorick*, 29 S. C. 533, 8 S. E. 8, 2 L. R. A. 212; *Elliott v. Dean*, Cababe & E. (N. P. Rep.) 283; *Debeil v. Thompson*, 3 Beav. 469; *Dodge v. Van Lear*, 5 Cranch C. C. 278, Fed. Cas. No. 3956; *Gale v. Nixon*, 6 Cow. 448; *Toomer v. Dawson*, Cheves L. Idaho, Vol. 10—27

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68; Benjamin on Sales, 6th ed., Bennett's Notes, 200.) The draft of the deed and the letters in this case are as binding upon the defendant, Iva Rogers, as if signed by her. She signed the receipt for the payment after the draft of the deed had been made, and with full knowledge and acquiescence in all the terms and conditions of the contract. The letters purport to have been written after consultation between her and the defendant, Albert H. Rogers. (*Service et ux. v. Deming Investment Co.*, 20 Wash. 668, 673, 56 Pac. 837; *O'Connor v. Jackson et al.*, 33 Wash. 219, 74 Pac. 372; *Reed v. Loney*, 22 Wash. 433, 61 Pac. 41.)

C. F. McDonald and William McDonald, for Respondents.

An agreement for the sale of real estate must be in writing, subscribed by the party sought to be charged. (Rev. Stats., sec. 6009, subd. 5.) Was there a sufficient memorandum of the contract for the sale of real estate shown to take the case out of the statutes of fraud? It must show who are the contracting parties, intelligently identify the subject matter involved, express the consideration, be signed by the party to be charged, and disclose the terms and conditions of the agreement. (*Catterlin v. Bush*, 39 Or. 496, 59 Pac. 706, 65 Pac. 1065; 22 Am. & Eng. Ency. of Law, 1st ed., pp. 932, 933; *Minturn v. Baylis*, 33 Cal. 129-133.) Where no sufficient evidence has been adduced by the plaintiff to justify the jury in finding a verdict in his favor, the court may order a nonsuit. (16 Am. & Eng. Ency. of Law, 1st ed., p. 741; *Yorke v. Allen*, 20 La. Ann. 237; *Baldwin v. Shannon*, 43 N. J. L. 596; *Pope v. Boyle*, 98 Mo. 527, 11 S. W. 1010.)

STOCKSLAGER, J.—This action was commenced in the district court of Idaho county, to enforce the specific performance of a contract alleged to have been entered into on the seventeenth day of November, 1902, and by the terms of which it is alleged plaintiff—appellant here—was to pay to defendant—respondent here—\$2,000 for certain real estate described in the complaint as the community property of defendants. Plaintiff was to assume the payment of a certain mortgage of \$800 and

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pay \$500 on or before three weeks after said seventeenth day of November, 1902, and \$500 on or before March 1, 1903. That upon the payment of \$500 being made on or before three weeks after said seventeenth day of November, 1902, said defendants were to execute and place in escrow a deed for said premises to be delivered upon the final payment being made; that at the time of making said contract plaintiff paid to said Rogers and wife the sum of \$190 as part payment on said lands. That on or about the sixth day of December, 1902, plaintiff tendered to said Rogers \$500 and demanded the execution of said deed, and that the same be deposited in escrow; that the same was refused.

That on January 27, 1903, plaintiff tendered to said Rogers the full amount due on said lands, \$1,010, and demanded a deed for same, which was refused. Again, on February 17, 1903, a further tender was made which was refused. Plaintiff alleges readiness and willingness on his part to perform his contract. Plaintiff further alleges that on December 29, 1902, defendants, Rogers and wife, executed to Morgan F. Rogers a mortgage upon said lands in the sum of \$500; that the defendants have conspired together and by fraud and collusion have refused to complete said contract; that Morgan F. Rogers is the father of defendant, Albert H. Rogers; that in further conspiracy and fraud defendants caused to be filed by defendant Iva Rogers, on the sixth day of February, 1903, a claim, or pretended claim, of homestead on said premises. This statement is taken from appellant's brief. It is concurred in by counsel for respondent with the exception that they insist that the record shows that Albert H. Rogers and wife, with their family, resided upon the property as a homestead, and further that the complaint does not allege part performance, possession or valuable improvements upon said land or any part thereof by appellant. The facts disclosed by this statement seem to be borne out by the record. Defendants Albert H. and Iva Rogers demurred to the complaint jointly, and Morgan F. Rogers separately. If these demurrers were ever disposed of by the court it is not shown by the record. On the — day of September, answers were filed by the defendants, putting in issue all the material allegations of the complaint. On the

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thirteenth day of February, 1904, the case was tried by the court without a jury. After plaintiff had rested his case a motion on the part of the defendants for nonsuit was sustained, and judgment for costs awarded to defendants. The appeal is from this judgment. If appellant had a cause of action, it is based upon his Exhibit "B" shown by the record. It follows:

"Lowe, Idaho, Nov. 17, 1902.

"Received from S. C. Kurdy one hundred and ninety (\$190.00) dollars on land sec. 25, Ts. 32, R. 2 E., 160 acres.
"\$190.00.

"TVA ROGERS.

"A. H. ROGERS."

Appellant testified that Mrs. Rogers wrote the receipt—the written part of the receipt.

Plaintiff next introduced a letter from defendant A. H. Rogers, as follows:

PLAINTIFF'S EXHIBIT "C."

"Lowe, Idaho, Dec. 7th, 1902.

"Mr. S. C. Kurdy.

"Dear Sir: I received your letter yesterday. I have been studying over this deal lately. It puts me in a bad shape, and isn't near enough for the place, and as we haven't signed the deed yet, I will send you your money back, and Asker says he can't pay the note yet. I will pay you back every cent you have paid me. I have got the money. You had better let me know how you want me to send it. I can't make the deal I was aiming to, and it makes me in a bad shape if I let my place go, and as either of us have not signed the deed, we have decided to keep it.

A. H. ROGERS."

Plaintiff's Exhibit "D" is as follows:

"Lowe, Idaho, Jan. 26, 1903.

"Mr. S. C. Kurdy.

"Dear Sir: As I received your letter yesterday, in answer I want to say in regard to your holding us to a contract you have not got any contract to hold us to. That is only a receipt and

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it is not paid. The note has not been paid. Iva says that she will not sign the deed for that price. She has never said she would sign the deed. The place is worth \$3,000, and I will spend \$1,000 before we will take that. Now, as it is the way it is, we will do this. She says she will sign the deed for \$500, and as to suing us, I have got as much money to spend as you have, and you will have to stand good for the cost. I have as good lawyers as Mr. Fulton is. A. H. ROGERS."

Exhibit "A" is a draft of a deed with usual covenants, which was never signed by either of the defendants. It will be seen that the only question presented to us is whether the receipt in evidence as plaintiff's exhibit was sufficient to take the case out of the control of the statute of frauds. If it was, it was error to sustain the motion for a nonsuit; otherwise, the judgment must be affirmed.

Section 6007 says: "No estate or interest in real property, other than for leases for a term not exceeding one year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law or a conveyance or other instrument in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing."

Section 2921 says: "No estate in the homestead of a married person, or any part of the community property occupied as a residence by a married person can be conveyed or encumbered by act of the party, unless both husband and wife join in the execution of the instrument by which it is so conveyed or encumbered, and it be acknowledged by the wife as provided in chapter 3 of this title."

Subdivision 5 of section 6009 says: "An agreement for the sale of real estate must be in writing subscribed by the party sought to be charged."

Is the receipt (Plaintiff's Exhibit "B"), if it may be so called, sufficient to satisfy these provisions of the statute? Appellants insist that the receipt, together with the other exhibits, were at least sufficient to put the defendants on their proof, and hence the motion for nonsuit was erroneously sustained.

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Also that the record of legal evidence before the trial court at the time the motion for nonsuit was sustained does not show that the defendants, Albert H. and Iva Rogers, were occupying the land in dispute as a homestead. Further, that even though the separate answers of the defendants set out that they were, and for five years had occupied the premises as a homestead, the trial had not sufficiently progressed for the court to consider the contents of the answer; that all the court could legally consider was the complaint and the evidence introduced by the plaintiff. In support of this contention he cites *Law v. Spence*, 5 Idaho, 244, 48 Pac. 282; *Northwestern and Pacific Hypotheek Bank v. Rauch*, 7 Idaho, 152, 61 Pac. 516—both decisions of this court. We find nothing in either of these cases that aids the appellant in his contention, so far as the important question in the case at bar is concerned. After the introduction of the four exhibits, counsel for plaintiff offered to show by oral evidence the terms of the contract and that Iva Rogers consented to it. To the introduction of this evidence there was an objection, and the court in sustaining the objection very properly said: "Before you offer any oral evidence you will have to show the court you have a memorandum such as the statute of frauds contemplates before you go into the statement of any conversations."

The case of *Catterlin v. Bush*, 39 Or. 496, 59 Pac. 706, 61 Pac. 1064, discusses a very similar question, and holds the following memorandum insufficient under the statute of frauds:

"Price \$6,000. C. pays note for \$200. Deed to be special warranty, and C. pays for cablegram, money to be paid on or before forty days. Possession when money paid and deed given to W. for 297 acres more or less as shown by deed. Abstract furnished held insufficient."

This is the holding of the courts generally and seems to be the accepted doctrine to govern all cases of this character.

The memorandum or receipt, Plaintiff's Exhibit "B," is deficient in many of the elements necessary to enforce specific performance. It does not state the consideration or any of the terms or conditions of the sale. It does not describe the land or even the county or state where situated. It is a well-settled

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rule that courts will enforce the specific performance of contracts of this character, but will not make them. The contract must speak for itself, and if it is sufficiently definite in its terms to enlighten the court of the intent of the parties it will be enforced. Oral evidence is not admissible to make a contract of this character or supply any of its terms or conditions, for the reason that it would open the door to all manner of fraud and deception.

The judgment is affirmed with costs to respondent.

Sullivan, C. J., and Ailshie, J., concur.

(December 22, 1904.)

MORROW v. MATTHEW.

[79 Pac. 196.]

GRUBSTAKE AGREEMENT—MINING CLAIMS—ACTION TO DECLARE LOCATOR TRUSTEE—WEIGHT OF EVIDENCE—EXCEPTION FROM GENERAL RULE.

1. The rule which has been adopted and followed by courts of equity requiring a plaintiff who seeks to establish a trust in real property contrary to the express terms of the deed which vested title in another to make out his case "clearly and satisfactorily beyond a reasonable doubt," does not find the same reason for its application in a case where a party to a "grubstake" agreement invokes the aid of a court of equity in establishing a trust in mining claims located on the public domain by one of the parties to such agreement.

2. *Id.*—A location notice is not an instrument of like solemnity and dignity as sealed instruments at common law, and in cases seeking to establish a trust is not entitled to protection under the same rules applicable to sealed instruments.

3. The courts will not refuse to enforce a "grubstake" agreement simply because a complainant cannot produce that great preponderance of evidence which produces a moral certainty and precludes all reasonable doubt.

(Syllabus by the court.)

APPEAL from District Court in and for Shoshone County.
Honorable Ralph T. Morgan, Judge.

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Action to establish a trust in certain mining property acquired under a "grubstake" agreement and to compel a conveyance of the trust interest to the *cestui que trust*. Judgment for plaintiff and order denying a new trial, from both of which defendants appealed. Affirmed.

The facts are stated in the opinion.

Robertson, Miller & Rosenhaapt and James E. Babb, for Appellants, cite few authorities upon the questions decided not cited in the opinion.

George G. Pickett, W. B. Heyburn, John P. Gray and John B. Goode, for Respondent.

Where two or more parties enter into a contract, as they did in this case, one or more of the parties cannot, without notice to the other parties in interest, rescind the same at will. The contract cannot be affirmed in part and rescinded in part. The party wishing to rescind must exercise the right within a reasonable time, and not wait until a rescission will work a great injury to the opposite party. (*Chadbourn v. Davis*, 9 Colo. 581, 13 Pac. 721; *Mills v. City of Osawatimie*, 59 Kan. 463, 53 Pac. 470; *Cole v. Smith*, 26 Colo. 506, 58 Pac. 1086.) Mr. Lindley in his work on Mines, second edition, volume 2, section 858, page 1556, says, speaking of grubstake contracts: "Should the prospector during the life of the contract, locate in his own name to the exclusion of the one supplying the capital, the title thus acquired by him would be held in trust for his associates in the joint venture to the extent of his interest, not necessarily on the theory of partnership, but for the reason that his advances contributed to the acquisition of property." (*Meylette v. Brennan*, 20 Colo. 242, 38 Pac. 75.) The law as to what evidence is necessary to support a conveyance under a contract like the one in question has been passed upon by the supreme court in this state in the case of *Rice et al. v. Rigley et al.*, 7 Idaho, 115, 61 Pac. 290; *Mayhew v. Burke*, 3 Idaho, 333, 29 Pac. 106.

AILSHIE, J.—This action was commenced by the plaintiff, J. A. Morrow, on what is commonly known as a "grub-

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stake" agreement to recover a one-sixth interest in and to the Wild Rose, Albert Edward, Little Annie, Lillian and Chronicle quartz mining claims, and the Wild Rose millsite. The agreement on which the plaintiff claims the right of recovery was in parol. The contract as testified to by plaintiff, and corroborated in many respects by his witnesses, was substantially as follows: About December, 1899, the defendant, Matthew, met with the plaintiff and defendant Ellis at the place where they were engaged at work, and stated to them that he had been prospecting on Quartz creek for several years, and had found nothing worth locating, and that he wanted to change the following year and prospect in another locality. He requested the plaintiff and Ellis to grubstake him for prospecting the following year. After some discussion over the matter it seems that they agreed to do so, and he informed them that it would be about June or July of the following year before he would be ready to leave the Quartz creek country and go over to their section to begin prospecting. Morrow and Ellis agreed to furnish him a cabin, provisions and tools for the work. Matthew stayed over night with Morrow and Ellis and left the following day. The matter ran along until about the latter part of August, or 1st of September, 1900, and in the meanwhile the plaintiff met Matthew frequently, and was as often asked by him if he still intended to carry out the agreement, to which the plaintiff repeatedly replied in the affirmative. Sometime about the last-named date Ellis had a talk with the plaintiff concerning their carrying out the agreement, and they agreed that they would do so, and when Matthew came over in a few days they told him to occupy a cabin of theirs, known as the Dewey cabin, and to use the provisions and tools therein. At that time the plaintiff and Ellis appear to have had a very fair supply of provisions on hand at the Dewey cabin, and on the day Matthew went into this cabin Ellis bought a further small bill of provisions. Matthew occupied the cabin, used the provisions and tools and began prospecting and carried this on from time to time until May or June of the following year. In the meanwhile the plaintiff had furnished him some small additional items, and notified one of the merchants at Pierce

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City to let him have such things as he needed. A great deal of this evidence is corroborated by other witnesses produced by the plaintiff. On the other hand, the greater portion of it is denied by defendants, Ellis and Matthew and witnesses produced by them. It can serve no useful purpose here to go into a detailed statement of the evidence given by each of the witnesses produced, and we shall not attempt it. During the period covered by this agreement, the defendants acquired interests in each of the claims for which the plaintiff sues to recover the interest claimed by him. After the conclusion of the trial had in this case, the court made his findings of fact and conclusions of law, and rendered and entered judgment in favor of the plaintiff as prayed for in his complaint. After a most careful and thorough examination of the record in this case and the law applicable thereto, we are convinced that the findings of fact as made by the trial judge are sustained by the proofs in the case, and we therefore give them here in full:

"1. That about the first day of September, 1900, the plaintiff and the above-named defendants entered into an agreement whereby, and by the terms of which agreement, the above-named defendant Matthew undertook with the plaintiff and the above-named defendant Ellis that he, the said defendant Matthew, would go into the southern portion of Shoshone county, Idaho, and there prospect for mines and when found, locate mining claims, subject to location under the laws of the United States and the state of Idaho, for the joint use and benefit of this plaintiff and said defendants. That in each and every mining claim so discovered, located or acquired in any manner by said Matthew, by the terms of said agreement, the plaintiff and the said defendants were to be equally interested, whether said defendant Matthew should acquire the said mining claim, or any interest therein, by location, purchase, gift or for services rendered.

"2. That in consideration of the acts and things so to be done by the said Matthew as aforesaid, this plaintiff and the defendant Ellis entered into an agreement with the said Matthew, whereby and by the terms of which agreement this plaintiff and said defendant Ellis were to furnish the said Matthew such sup-

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plies, tools and implements and other things of necessity incident to such prospecting, locating and acquiring mining claims, as said Matthew might require in and about the keeping of the said agreement and contract on his part.

"3. That at the time of the making of the said agreement, the plaintiff and the said Ellis furnished the said Matthew with a complete outfit of provisions, supplies, tools and other things necessary to be used in prospecting as aforesaid, and delivered the same to the said Matthew, whereupon the said Matthew, pursuant to said agreement, went into the southern portion of Shoshone county for the purpose of prospecting as aforesaid.

"4. That while so using the materials and supplies furnished by the said plaintiff and defendant Ellis as aforesaid, the said defendant Matthew did, on or about the twenty-fifth day of May, 1901, acquire an undivided one-half interest in and to the Wild Rose mining claim, situated in the Pierce City mining district, Shoshone county, Idaho, which said Wild Rose mining claim was located in the name of W. S. Wilkinson, and said Matthew assisted in the making of said location, and said Wilkinson, pursuant to an agreement with the said Matthew, conveyed the said undivided one-half interest in and to the said Wild Rose claim to said Matthew, notice of location of said Wild Rose lode mining claim being recorded on the fifteenth day of July, 1901, in book W of Quartz Locations, at page 24 thereof, records of Shoshone county, Idaho. That the said Matthew received a deed to the said undivided one-half interest in the said Wild Rose mining claim from said Wilkinson, pursuant to an agreement made between the said Wilkinson and the said Matthew. That said Matthew should share equally in said location by reason of having prospected for and participated in the location of said claim, and said Wilkinson was fully advised at the time of the making of the deed that the said Matthew was working under a grubstake contract with this plaintiff and the defendant Ellis.

"5. That the plaintiff, independent of the said Ellis, furnished the said Matthew provisions and supplies for the purpose of prospecting as aforesaid, of the value of more than \$75, and

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said Matthew was living upon and using the supplies so furnished by plaintiff at the time of the location of the Wild Rose mining claim, and of his receiving an interest therein, and said Matthew received such interest in said Wild Rose mining claim for the benefit of himself, the said Ellis and this plaintiff in equal portions.

"6. That by reason of the said contract and the matters and things hereinbefore set forth, the plaintiff is the owner of, and since the date of location thereof has been the owner of, an undivided one-sixth interest of, in and to the said Wild Rose mining claim, the Albert Edward lode claim, the Little Annie lode claim, the Lillian lode claim, and the Chronicle lode claim, and the Wild Rose millsite, all situated in Shoshone county, state of Idaho.

"7. That it appears from the evidence that defendant Matthew had conveyed, before the commencement of this suit, all of the interests standing in his name, except an undivided one-third interest in the Chronicle lode claim. That the said Ellis has standing in his name and subject to the rights of the plaintiff an undivided one-fourth interest in the said Wild Rose lode claim, an undivided one-third interest in the Wild Rose millsite, and an undivided one-third interest in each of the other above-named mining claims.

"8. That the Wild Rose mining claim was first located in the name of defendant Matthew and one Wilkinson, and that the defendant Matthew at the time of the location of the Wild Rose lode claim, held a one-half interest therein under the terms of the prospecting contract hereinbefore found, and of said one-half interest said Matthew owned one-sixth, said Ellis owned one-sixth and said plaintiff owned an undivided one-sixth interest therein.

"9. That the defendants Ellis and Matthew undertook to defraud the plaintiff of his interest in the mining claims located under said contract, and that the taking down of the notice of location containing the names of Matthew and Wilkinson, and substituting for it a location notice in the name of Wilkinson alone, and the subsequent taking of deed from Wilkinson to Ellis (Matthew) for a one-half interest in said claim was a

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part of the plan entered into between Matthew and Ellis to defraud the plaintiff of his rights under said contract.

"10. That the plaintiff is in no way indebted to the defendants Matthew and Ellis in connection with the prospecting, locating, owning or recording of said several mining claims, or any of them. That the plaintiff kept and performed all of the terms of his contract for furnishing supplies and necessary materials to the defendant Matthew, and that said locations were each and all of them made during the life of said contract, and during the time the plaintiff so furnished such supplies."

The defendants Ellis and Matthew in their answer deny having ever entered into the contract as alleged by the plaintiff, and as a further and separate defense set up a written contract between Ellis and Matthew, whereby Ellis agreed to furnish Matthew with provisions and tools for the period of one year from August 8, 1900, and pay him the sum of \$10 per month, and Matthew agreed in consideration thereof to prospect for minerals, and to grant to Ellis an undivided one-half interest in and to all discoveries made by him. The chief contention in this case seems to have been made over the Wild Rose claim, which is evidently the one of greatest value. The circumstances as detailed in the record surrounding the location of the Wild Rose, and the subsequent record title therein acquired by Ellis and Matthew was somewhat peculiar and singular, and indeed arouse some spirit of inquiry themselves. Matthew appears to have informed one W. S. Wilkinson, the locator of the Wild Rose, where there was some good-looking float and a promising field for prospecting, and in pursuance of the information thus acquired Wilkinson went into the section where he afterward located the Wild Rose, and prospected and discovered what appeared to be valuable ores, and later Matthew assisted in the location of the claim. It appears that the notice of location was prepared and contained the names of Wilkinson and Matthew as locators; but according to the version given by Matthew, Wilkinson objected to having a partner in the claim, and accordingly posted a notice containing his own name alone. After the location, however, it appears that Wilkinson deeded Matthew an interest in the claim. Matthew in

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turn conveyed one-half of the interest so acquired to Ellis. It is claimed by the plaintiff that this transaction between Wilkinson, Matthew and Ellis was had for the purpose of defeating any interest that Morrow might acquire under their grubstake agreement. It is argued that if Matthew and Wilkinson had jointly located the Wild Rose, then, under the agreement contended for by plaintiff, the defendants Matthew and Ellis, and the plaintiff would have each been entitled to a one-sixth interest in the claim; but if Wilkinson conveyed a one-half interest in the claim to Matthew and they left Morrow out, then Matthew and Ellis would each own a one-fourth interest in this claim, and that this was the controlling reason why Matthew took his interest by deed rather than as a joint locator with Wilkinson. It should be borne in mind that the defendants denied all these charges and supported their denials with their sworn testimony.

A great number of errors have been assigned by the appellants Matthew and Ellis, some of them going to the rulings of the court in the admission of certain testimony and rejection of other, while others are directed at the insufficiency of the evidence to support the findings. After a careful examination of the various rulings of the court complained of in the admission and rejection of testimony, we are satisfied that no error has been committed in those respects. We do think, however, that it would have been proper for the court to have allowed the question asked the plaintiff on cross-examination, which tended to show that he had been guilty of laches in not asserting his claim in the property sooner. These facts, however, were brought out at other places and frequently in the course of the trial, and we do not think the appellants were in any way prejudiced by the ruling of the court, as the answers, if given, would have only been cumulative.

The main question urged upon this appeal, and we think the only serious question and difficult question presented, is that the evidence as a whole does not support the findings and judgment.

Appellants in their brief say: "The clear preponderance of this case is in favor of the defendants, and under no condition

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can it be considered as ever approaching the bare preponderance even, in favor of the plaintiff, to say nothing of the certainty and definiteness required by the plaintiff in a case of this kind," and thereupon the appellants lay down the following proposition: "The plaintiff is required to produce more than a bare preponderance of the evidence, and must make out his case clearly and satisfactorily beyond a reasonable doubt to be entitled to a decree." In support of this position taken we are cited to the following authorities: *Rice v. Rigley*, 7 Idaho, 115, 61 Pac. 290; *Skeen v. Marriott*, 22 Utah, 73, 61 Pac. 296; *Chambers v. Emery*, 13 Utah, 374, 45 Pac. 192; *Chittyna Exp. Co. v. Fitch* (Alaska); *Mayhew v. Burke*, 3 Idaho, 333, 29 Pac. 106; *Larkins v. Rhodes*, 5 Port. (Ala.) 207; *Lee v. Browder*, 51 Ala. 289; *Chambers v. Richardson*, 57 Ala. 87; *Lehman v. Lewis*, 62 Ala. 133; *Mobile Life Ins. Co. v. Randall*, 71 Ala. 221; *Bibb v. Hunter*, 79 Ala. 358; *Reynolds v. Caldwell*, 80 Ala. 235; *Crittenden v. Woodruff*, 11 Ark. 89; *Johnson v. Richardson*, 44 Ark. 370; *Crow v. Watkins*, 48 Ark. 174, 2 S. W. 659; *Millard v. Hathway*, 27 Cal. 120; *Woodside v. Hewel*, 109 Cal. 481; *Harvey v. Pennypacker's Exr.*, 4 Del. Ch. 460; *Lofton v. Sterret*, 23 Fla. 574, 2 South. 837; *Mahoney v. Mahoney*, 65 Ill. 407; *Heneke v. Floring*, 114 Ill. 558, 2 N. E. 529; *McGinnis v. Jacobs*, 147 Ill. 31, 35 N. E. 214; *Jenison v. Graves*, 2 Blackf. (Ind.) 448; *Parmlee v. Sloan*, 37 Ind. 482; *Olive v. Dougherty*, 3 G. Greene (Iowa), 372; *McGregor v. Gardner*, 14 Iowa, 342; *Parker v. Pierce*, 16 Iowa, 231; *Sunderland v. Sunderland*, 19 Iowa, 329; *Childs v. Griswold*, 19 Iowa, 363; *Nelson v. Worrall*, 20 Iowa, 471; *Maple v. Nelson*, 31 Iowa, 327; *Sheppard v. Pratt*, 32 Iowa, 298; *Snelling v. Utterbach etc.*, 1 Bibb (Ky.), 610; *Hickey v. Young*, 1 J. J. Marsh. (Ky.) 3; *Carey v. Callan's Exr. etc.*, 6 B. Mon. (Ky.) 45; *Whitmore v. Beuard*, 70 Me. 284; *Faringer v. Ramsey*, 4 Md. Ch. 37; *Dorsey v. Clarks*, 4 Har. & J. 557; *Geer v. Baughman*, 13 Md. 268; *Thomas v. Standiford*, 49 Md. 184; *Witts v. Horney*, 59 Md. 585; *Kendall v. Mann*, 11 Allen, 19; *Johnson v. Quarles*, 46 Mo. 426; *Ringo v. Richardson*, 53 Mo. 395; *Forrester v. Scoville*, 51 Mo. 269; *Kennedy v. Kennedy*, 57 Mo. 73; *Forrester v. Moore*, 77 Mo. 662; *Shaw v. Shaw*, 86 Mo. 598; *Rogers*

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v. Rogers, 87 Mo. 259; *Allen v. Logan*, 96 Mo. 601, 10 S. W. 149; *Burdett v. May*, 100 Mo. 16, 12 S. W. 1056; *Davis v. Green*, 102 Mo. 184, 14 S. W. 876, 11 L. R. A. 90; *King v. Isley*, 116 Mo. 159; *Bradley v. Bradley*, 119 Mo. 61, 24 S. W. 757; *Plumb v. Cooper*, 121 Mo. 674, 26 S. W. 678; *Logan v. Johnson*, 72 Miss. 187, 16 South. 231; *Frederick v. Haas*, 5 Nev. 389; *Dalton v. Dalton*, 14 Nev. 419; *Cutler v. Tuttle*, 19 N. J. Eq. 560; *Tunnard v. Littell*, 23 N. J. Eq. 267; *Midmer v. Midmer's Exr.*, 26 N. J. Eq. 304; *Parker v. Snyder*, 31 N. J. Eq. 169; *McKeown v. McKeown*, 33 N. J. Eq. 387; *Krauth v. Thiele*, 45 N. J. Eq. 410, 18 Atl. 351; *Barbour v. Barbour*, 51 N. J. Eq. 271, 29 Atl. 148; *Freeman v. Kelley*, Hoffm. Ch. 92; *Boyd v. McLean*, 1 Johns. Ch. 590; *Malin v. Malin*, 1 Wend. 649; *McGinty v. McGinty*, 63 Pa. St. 42; *Nixon's Appeal*, 63 Pa. St. 282; *Kistler's Appeal*, 73 Pa. St. 399; *Brickell v. Earley*, 115 Pa. St. 479, 8 Atl. 623; *Sillian v. Haas*, 151 Pa. St. 63, 25 Atl. 72; *Billings v. Clinton*, 6 S. C. 102; *McGammon v. Pettitt*, 3 Sneed (Tenn.), 246; *Hall v. Fowikes*, 9 Heisk. (Tenn.) 753; *Holder v. Nunnally*, 2 Cold. (Tenn.) 289; *Agricultural Assn. v. Brewster*, 51 Tex. 263; *Miller v. Blose's Exr.*, 30 Gratt. (Va.) 751; *Kane v. O'Connors*, 78 Va. 76; *Donaghe v. Tams*, 81 Va. 142; *Smith v. Patton*, 12 W. Va. 552; *Towle v. Wadsworth*, 147 Ill. 80, 30 N. E. 602; *Reeve v. Strawn*, 14 Ill. 94; *Corder v. Corder*, 124 Ill. 229, 16 N. E. 107; *Purcell v. Miner*, 4 Wall. 513; *Shaw v. Shaw*, 86 Mo. 594; *Woodward v. Siebert*, 82 Va. 441; *Buyers v. Danley*, 27 Ark. 88; *Reynolds v. Caldwell*, 80 Ala. 232; *Dudley v. Bachelder*, 53 Mo. 403; *Strong v. Messenger*, 148 Ill. 431, 36 N. E. 617.

Rice v. Rigley decided by this court is so materially different from this case in the facts upon which it rests, that we do not consider it decisive of the case under consideration. The rule, however, contended for by appellants was announced in that case.

The other cases announce substantially the same proposition of law. After an examination of practically all of these cases it is, to my mind, worthy of note that this doctrine arose out of an entirely different class of cases from the one under consideration. It had its origin in courts of exclusively chan-

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cery jurisdiction where the bill sought reformation of a deed or other instrument under seal; or where the complainant prayed that a trust be declared in his favor in property contrary to the express terms of the deed or conveyance which vested the legal title in another. While this doctrine was being promulgated in courts of chancery, under the practice of those courts, the evidence was taken by a master in chancery and was reported to the court for its consideration and no witnesses appeared before the chancellor. The practice is now quite different—the witnesses appearing and testifying before the judge sitting as a chancellor and giving him an opportunity of seeing and hearing them as they testify and thereby enlarging his opportunity for judging of their veracity, bias, prejudice, interest, motives and opportunity for knowing and comprehending the facts about which they are testifying. Through the medium of this practice the courts of this state, as well as of other states, have held that where the witnesses appear and testify in a court of equity and there is a substantial conflict in the evidence, the appellate court will not disturb the findings and judgment of the trial court. (*Stuart v. Hauser*, 9 Idaho, 53, 72 Pac. 719; *Commercial Bank v. Lieuallen*, 5 Idaho, 47, 46 Pac. 1020; *Doe v. Vallejo*, 29 Cal. 391; *Silva v. Pickard*, 14 Utah, 254, 47 Pac. 144, and cases cited. To same effect, see *Roby v. Roby*, ante, p. 139, 77 Pac. 213; *McGinnis v. Jacobs*, 147 Ill. 30, 35 N. E. 214.)

Again, it is everywhere held that in criminal cases the jury must be satisfied of the guilt of the defendant beyond a reasonable doubt, and yet when a conviction was had it has been held that "where there is a substantial conflict in the evidence on the material issues involved, a new trial will not be granted." (*State v. Collett*, 9 Idaho, 608, 75 Pac. 271; *People v. Arthur*, 93 Cal. 536, 29 Pac. 126.)

It must therefore be presumed that, notwithstanding to how great an extent the rule announced has been applied by the courts, it has never been the purpose of any of them to carry a rule for the security of property and property rights beyond that recognized for the protection of life and liberty.

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The mere statement of the principal reason assigned by the great majority of cases for the adoption, maintenance and application of the rule contended for in this case demonstrates how illogical and unreasonable it would be to assign the same reason in this class of cases. That reason is pointedly stated by the supreme court of Alabama in *Bobb v. Hunter, supra*, where the court says: "The burden of removing a presumption that the conveyance speaks the truth rests on the complainant. Appreciating the danger of having the deeds or other solemn writings displaced by parol evidence, easy of fabrication, and sometimes incapable of contradiction, the courts have generally upheld the rule that the presumption arising from the conveyance must prevail, unless overcome by evidence full, clear and satisfactory."

It seems to me that there is a clear distinction between the class of cases cited in which a trust is sought to be established and cases like the one at bar where all the record title there is was initiated and executed by the defendant and locator himself. The record title to mining claims located upon the public domain is wholly the production and instrument of the locator himself to which no other person is a party; neither is it an instrument of the solemnity and dignity of sealed instruments in any matter in which its office is invoked as a protection solely for the benefit of the locator as against any other person. Especially is this true in a case where the locator invokes the verity attaching to sealed instruments to protect him against the claim of one whose name he should have placed on that notice. It must necessarily follow that when one of the parties to the grubstake agreement asserts his right in a court of equity to an interest in a mining claim located by a party to such contract, he is not in the position of seeking to assert or establish a right which is in conflict with the express terms of a deed of conveyance or other written instrument of like dignity and solemnity. By such action he is seeking to establish a tenancy in common with the locator which does not appear by the record title, created by the locator alone, but which in fact does exist in equity and good conscience. (2 Lindley on Mines, sec. 858; *Miller v. Butterfield*, 79 Cal. 62,

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21 Pac. 543.) During the early growth of the doctrine contended for, no such contracts as the one under consideration were known or recognized; and in fact the "grubstake" agreement is a production of the mining states of the west.

Appellants have quoted at length in their brief from *Chityna Exploration Company v. Fitch*, decided by Judge Wickersham at Valdez, Alaska, November 28, 1903, but we have been unable to find that case reported except as we have read it from the "Alaska Prospector" furnished us by appellants' counsel. Some of the things stated in that opinion *arguendo* indicate a conclusion similar to that contended for by appellant here, but the court seems to have decided the case on another point and held that the property acquired by defendants did not fall within the terms of the agreement of agency and employment established by the plaintiff. It is certainly true, as stated in that case, that the plaintiff in such cases has the burden of proof resting on him, but that is true in all cases. The *onus probandi* rests on the plaintiff always. (1 Greenleaf on Evidence, sec. 74, and cases cited.) Of course we appreciate the fact that a distinction must be recognized between the *burden of proof* and *weight of evidence*.

"In a case like this the material issue is: Was the contract alleged by the plaintiff entered into between him and defendant? Here the contract alleged was in parol. Such contracts when established are enforced by the courts where they are executed as to the plaintiff. It is generally held that such partial execution takes the contract out of the operation of the statute of frauds. (*Gore v. McBrayer*, 18 Cal. 582; *Moritz v. Lavelle*, 77 Cal. 10, 11 Am. St. Rep. 229, 18 Pac. 803; *Book v. Justice Min. Co.*, 58 Fed. 119; *Herbaur v. Reeding*, 3 Mont. 21; *Raymond v. Johnson*, 17 Wash. 237, 61 Am. St. Rep. 908, 49 Pac. 492.)"

When the fact is established that the contract was entered into and the terms and conditions thereof are shown, it will be enforced, whether in writing or parol. It is also true that the courts have quite generally held that in order to enforce the specific performance of a parol contract it must be *clearly* and *satisfactorily* shown to the trial court as to its execution

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and the terms and conditions thereof. If the contract has not been reduced to writing it must of necessity require a greater weight of evidence to establish its existence, and the terms and conditions thereof, and in those respects satisfy the mind of the court, than if the contract were in writing and produced in evidence. Where, however, the record discloses such facts that a fair and reasonable person might conclude therefrom as to the execution, terms and conditions of the contract, I do not see how an appellate court is justified in saying that it did not appear *clearly* and *satisfactorily* to the trial court. Evidence entirely clear and convincing to the trial court who saw and heard the witnesses might, when in cold type upon the record, leave doubts in the minds of the members of the appellate court, but I do not think they should reverse the judgment on such grounds. The rule is one by which the trial court primarily weighs the evidence, and unless substantially departed from by him in arriving at his decision should not become one of original application on appeal.

In actions like the one at bar, where miners and prospectors must have necessarily reposed a peculiar trust and confidence in each other, it seems to me that the court should not refuse to enforce these "grubstake" agreements simply because a plaintiff cannot produce that great preponderance of evidence which reaches a moral certainty and precludes all reasonable doubt.

Applying these principles to the record before us, we would not be justified in disturbing the judgment of the trial court. An examination of the evidence produced in this case satisfies us that the contract was entered into as alleged by the plaintiff and that the defendants were endeavoring to avoid a compliance with its terms. It is true that practically all the material facts established by the plaintiff are contradicted by the defendants, but if such contracts cannot be enforced by the courts where they are denied by the defendant and his witnesses, there would be but few cases, if any, in which a decree could be entered for the plaintiff. Neither the amount of testimony nor its contradictory or corroborative nature constitute the leading or controlling elements in satisfying a court or jury as to the existence or nonexistence of the fact in issue. It is rather

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the convincing character and quality of the evidence concerning the particular fact in dispute. So it was in this case.

It is urged by appellants that the plaintiff was guilty of such laches in asserting his claim and prosecuting his action that it should operate as a positive bar to his recovery. In support of this we are cited to 18 Am. & Eng. Ency of Law, 2d ed., 100; 15 Am. & Eng. Ency. of Law, 2d ed., 1208. In the latter citation it is stated: "While the lapse of time may not be such as to constitute a bar upon the ground of laches, it may still have the effect of requiring a higher degree of proof to establish the trust." We think this authority correctly states the law on the subject. The evidence of whatever laches of which the plaintiff was guilty was before the court and was undoubtedly considered by him in arriving at his decision in the case. It was contended by the respondent, however, that he relied upon the good faith of his cotenant, or rather the one with whom he supposed he was a cotenant, to protect him and carry out the terms of the contract until about the time a sale was made of a part interest in the property when he discovered defendant's bad faith. In any event this evidence was before the court and was, we think, sufficient to justify the conclusion at which he arrived.

"It appears that prior to the commencement of this action the defendant Matthew had parted with practically all his interest in these properties, while Ellis still retained an interest in all of them. The court decreed the plaintiff a one-sixth interest in each of the properties and directed that that interest be taken out of any interest retained by Ellis where Matthew had parted with his interest and was not able to respond to the order and decree of the court. The appellants complain of this action of the court and contend that the whole interest claimed by respondent could not be taken from the holdings of either of the defendants alone. The appellants, however, seem to have overlooked the fact that the plaintiff charged the defendants Ellis and Matthew, and other parties to the defendant unknown, with fraud and conspiracy to cheat and defraud him out of his interest, and that by the ninth finding of the court as hereinbefore set out the court found for the plaintiff

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upon that issue. Under this allegation of the complaint and finding of the court we have no doubt of the right of the court to enter the decree as he did. We have found no sufficient reason for a reversal of this judgment, and think the action of the trial court has been regular and his conclusion fair and just in the matter. The judgment and order appealed from will be affirmed, and it is so ordered. Costs awarded to respondent.

Sullivan, C. J., and Stockslager, J., concur.

ON REHEARING.

(February 7, 1905.)

SULLIVAN, J.—A petition for a rehearing has been filed in this matter and carefully considered by the court. We find no new points raised in the petition that were not passed upon in the opinion in the case, and after a careful reconsideration of the matter and an examination of the authorities, we are satisfied with the conclusion reached in the original opinion. A rehearing is therefore denied.

Stockslager, C. J., and Ailshie, J., concur.

(December 31, 1904.)

WHITE v. JOHNSON.

[79 Pac. 455.]

LESSOR—LESSEE—COVENANT AGAINST SUBLEASING—TITLE TO REAL ESTATE IN THE UNITED STATES—TECHNICAL ERRORS AND DEFECTS.

1. Where W. makes homestead entry on government land and the entry is contested and before the final termination of the contest which results in W.'s favor, W. leases a small portion of such land to L. for a term of two years, with covenant against subleasing, and thereafter L. transfers his interest to C., and C. through quitclaim deeds from B. and his grantees and successors in interest to such tract of land claims title to such land under said conveyances from B. and his grantees and successors, W. is entitled to judgment against C. and his codefendants, L. and C.

Argument for Respondent.

2. Under the provisions of section 4231, Revised Statutes, the court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect.

(Syllabus by the court.)

APPEAL from the District Court of Kootenai County. Honorable R. T. Morgan, Judge.

Action to recover possession of real estate and damages for detention of the same. Judgment for plaintiffs. Affirmed.

The facts are stated in the opinion.

Charles L. Heitman, for Appellant.

No forfeiture clause is to be found in the lease, and it is well settled that courts will not decree a forfeiture, unless the party applying therefor is clearly entitled thereto. The law abhors a forfeiture. Forfeitures are odious. Covenants against subletting are to be strictly construed against the lessor. (18 Am. & Eng. Ency. of Law, 2d ed., p. 680, and cases cited.) The distinction between assignment and underletting is broad and well defined. An assignment conveys the tenant's whole estate, which is his entire interest in all the premises. (*Campbell v. Stetson*, 2 Met. (Mass.) 504; *Copland v. Parker*, 4 Mich. 660.) A covenant not to assign does not prohibit a subletting, and a covenant not to sublet does not prohibit an assignment. (*Copland v. Parker*, *supra*; *Den v. Post*, 25 N. J. L. 285; *Jackson v. Silvernail*, 15 Johns. (N. Y.) 278.)

H. M. Stephens, for Respondent.

This court cannot review the evidence or any objections to the findings of fact made by the district court, for the reason that no motion for new trial was made or filed in the district court. (*Toulouse v. Burkett*, 2 Idaho, 184, 10 Pac. 26; *Washington etc. R. R. Co. v. Osborne*, 2 Idaho, 559, 21 Pac. 421; *Gamble v. Dunwell*, 1 Idaho, 268; *Graham v. Linehan*, 1 Idaho, 780.) The lessee, H. D. Johnson, was and is estopped to dispute the title of the respondents. (18 Am. & Eng. Ency. of Law,

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2d ed., p. 411; *Jones v. Reilly*, 174 N. Y. 97, 66 N. E. 649; *Johnson v. Thrower*, 117 Ga. 1007, 44 S. E. 846; *Lyon v. Washburn*, 3 Colo. 205; *Carter v. Marshall*, 72 Ill. 609; *Campau v. Lafferty*, 43 Mich. 429, 5 N. W. 649, 650; *Sage v. Halverson*, 72 Minn. 294, 75 N. W. 229; *Parrott v. Hungleburger*, 9 Mont. 526, 24 Pac. 16; *Dixon v. Stewart et al.*, 113 N. C. 410, 18 S. E. 325; *Williams v. Wait*, 2 S. Dak. 210, 39 Am. St. Rep. 773, 774, 49 N. W. 209; *Lucas v. Brookes*, 18 Wall. 436, 21 L. ed. 779.) And this estoppel applies also to the appellants in this action, who went into possession through the tenant, H. D. Johnson, or by reason of the alleged conveyance by Johnson to one of the appellants. (18 Am. & Eng. Ency. of Law, 2d ed., p. 417.) And this estoppel is binding upon the appellants whether they knew of the title of the respondents or not, and it applies if the possession of the tenant, H. D. Johnson, was a means of acquiring possession by them or either of them. (18 Am. & Eng. Ency. of Law, 2d ed., p. 118; *McLennan v. Grant*, 8 Wash. 608, 36 Pac. 682; Taylor on Landlord and Tenant, 9th ed., sec. 705.)

SULLIVAN, C. J.—This action was originally brought against H. D. Johnson and F. S. Langley to recover the possession and restitution of certain real estate situated on the north side of the railroad track of the Northern Pacific Railroad in the northwest quarter of the southwest quarter of section 2, township 55 north, of range 2 east, Boise meridian, in Kootenai county. Thereafter an amended complaint was filed, in which the said Johnson and Langley, M. W. Caldwell and James Canning were made defendants. It appears from the judgment that the defendants, Langley, Caldwell and Canning appeared and that the defendant, Johnson, although duly and regularly served with summons, failed to appear or answer, and that his default was regularly entered. Thereupon a trial to the court was had without a jury and judgment was entered in favor of the respondents. The appeal is from the judgment and taken by Langley, Caldwell and Canning.

The following facts appear from the record: That the plaintiff, John E. White, made a homestead entry under the laws of Congress for the northwest quarter of the southwest quarter

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of section 2, township 55 north, range 2 east, and other land in Kootenai county on the twenty-seventh day of November, 1895, and that the land in dispute in this case is a part of said northwest quarter of the southwest quarter of said section 2. It also appears that said White had resided upon said forty-acre tract of land long prior to the date that he made said entry, and that he made said entry on the day that the government plat of the survey of said land was filed in the local land office; that on the same day, but after White's entry had been made, the probate judge of Kootenai county applied to file a townsite declaratory statement with a plat of the town of Clark's Fork attached thereto upon said land, which entry was rejected because of its conflict with White's said entry. Thereafter said probate judge filed an affidavit of contest asking for the cancellation of White's entry to said forty-acre tract upon the ground that said tract had been used and occupied for townsite purposes since the year 1884, and that said White's entry was made for speculative purposes. A hearing was had at the local United States land office which resulted in a decision to the effect that but two (2) acres of said forty-acre tract should be awarded to the contestant, and that White's entry should remain intact providing he should agree to convey, after patent, said two acres to said probate judge in trust for the benefit of townsite occupants. Both parties appealed from that decision, and such proceedings were had as finally resulted in a decision holding White's entry valid and superior to that of the townsite claimants and the probate judge's contest was dismissed and White's entry held valid and intact. That thereafter the patent of the United States conveying to said White said forty-acre tract with other land, was duly executed to said White on the fourteenth day of July, 1903.

It also appears that on the fourth day of December, 1901, said White leased the two lots in controversy to the defendant, H. D. Johnson, for a term of two years, for the consideration of \$140, and the further consideration that said lessee should leave thereon all buildings and other improvements that he should place thereon during the continuance of the lease. The lessee also agreed not to sublet said premises or any part thereof.

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Seventy dollars, or one-half of said \$140, was paid at the time said lease was executed, and it was agreed that the remaining \$70 should be paid on the fourth day of December, 1902. That said H. D. Johnson took possession of said premises under said lease and continued in possession thereof until about the second day of May, 1902, and on that date he sold to the defendant, F. S. Langley, and one Fred H. Johnson the buildings situated on said lots, together with the stock of liquors and the bar fixtures therein contained, and let them into the possession of said premises.

It appears from the averments of the answers of Canning and Caldwell that Canning now claims title to said lots through conveyances (quitclaim deeds) as follows: One dated July 11, 1900, from one Samuel Black to Ruben Johnson, Johnson to McWilliams, McWilliams to appellant Langley, Langley to appellant Caldwell, Caldwell to appellant Canning; and it is alleged that appellant Canning now holds possession of said premises by virtue of said conveyance from Caldwell and not otherwise. The defect in Canning's alleged title is in fact that it only relates back to the conveyance of July 11, 1900, of Samuel Black to Ruben Johnson. It is not connected with the United States as the original grantor, as is the title of the respondents. The grantor of the respondents is the United States, and the appellants have not shown that their grantor and predecessors in interest ever received any conveyance of said property from the United States or the respondents. They admit they have not. On the trial the patent from the United States conveying said land to respondent, John E. White, and other papers, were introduced on the trial on behalf of respondents and the quitclaim deeds referred to herein were introduced on behalf of the appellants. No oral evidence was adduced on the trial on behalf of appellants.

Said contest against the homestead entry of respondents had not been finally determined when this action was commenced and said patent was issued some time subsequent thereto. The foregoing facts establish the title to said lots in the respondent, John E. White.

Points decided.

There is no question but what the defendant, H. D. Johnson, entered into the possession of said premises under said lease from John E. White, and, while so holding, let the appellants into possession thereof and to evade the force of that provision prohibiting the subletting of said premises, quitclaim deeds from persons who never had any title to said lots were resorted to.

Technically, some of the errors assigned have some force, but under the provisions of section 4231, Revised Statutes, the court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which do not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect. There are no errors assigned that affect the substantial rights of the appellants. They have no right to either the possession or title to said lots. If, as suggested, defendant Johnson was not served with summons, and for that reason has not had his day in court, these appellants are in no wise affected by that fact. He may be heard on that question. Judgment is affirmed, and costs awarded to respondents.

Stockslager, J., and Ailshie, J., concur.

(December 31, 1904.)

PRICE v. GRICE.

[79 Pac. 387.]

LEASE—LEGAL TITLE TO LIVESTOCK—SALE BY LESSOR—ACCOUNTING—
TEMPORARY RESTRAINING ORDER—ALLEGATIONS ON INFORMATION
AND BELIEF—UNDERTAKING —DEMURREE—AFFIDAVIT —PRACTICE—
REMEDY AT LAW—PARTNERSHIP.

1. Where B. and B. lease certain real estate and personal property consisting of livestock and farming implements to G. for a term of five years, on condition that they shall receive one-half of the grain raised on said premises over and above the amount required to feed such livestock, and one-half of the increase and growth of such livestock or one-half of the price for which the same may be sold, the lessors are entitled to an accounting from the lessee each year for their half of the surplus grain, and are

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entitled to an accounting for one-half of the proceeds of sales of livestock.

2. Where a lease for a term of five years provides for the sale of the increase of certain livestock, one-half of the amount received therefor to go to the lessors and one-half to the lessee, the lessors are entitled to receive their one-half thereof whenever such livestock is sold.

3. Where the principal allegations in a verified complaint are made on information and belief, and the sources of information and basis of belief are not stated in the complaint but are stated in an affidavit filed in the case, an injunction may be granted thereon if the facts warrant it.

4. Where a restraining order is granted holding the matter *in statu quo* until a hearing thereon is had, and the hearing is had and the restraining order is continued in force upon condition that the plaintiff give a proper undertaking in a certain sum named, the action of the judge will not be reversed, for the reason that no undertaking was required prior to the hearing. It is error to grant a temporary injunction without requiring a proper undertaking.

5. A judge at chambers has no authority to hear and pass upon a demurrer.

6. Under the provisions of section 4288, Revised Statutes, where the facts are in dispute, the granting or dissolving of an injunction is within the sound discretion of the court.

7. The right to a preliminary injunction is generally addressed to the sound discretion of the court to be exercised according to the circumstances of each case.

8. Where the application for dissolving a preliminary injunction is heard upon the complaint and answer, it was not error for the judge to permit the plaintiff at the hearing to file an affidavit showing the sources of information and basis of belief of the allegations of the complaint which were stated therein on information and belief.

9. Upon a proper showing an injunction may issue to temporarily restrain an act which will result in great damage to the plaintiff although the injury is not irreparable and notwithstanding the plaintiff may have other remedies, following *Staples v. Rossi*, 7 Idaho, 618, 65 Pac. 67.

10. Where B. and B., who are mother and son, each owned certain real estate and personal property consisting of livestock and farming implements, joined in a lease to G. leasing to him such real estate and personal property, B. and B. are not necessarily partners, and under the provisions of the lease involved in this action, B. had a right to sell and dispose of the property belonging

Argument for Respondents.

to him included in said lease and such purchaser would be entitled to all of the rights that said B. had under the terms of said lease.

(Syllabus by the court.)

APPEAL from the District Court of Latah County. Honorable E. C. Steele, Judge.

Application to dissolve temporary injunction. Denied. Order affirmed.

The facts are stated in the opinion.

Stewart S. Denning, for Appellant.

The facts alleged necessarily must be alleged positively, not merely on information and belief. Where a verified complaint, instead of an affidavit, is used on motion for an injunction, only the positive allegations and those on information and belief, where the sources of information and the grounds of belief are stated can be taken as true. (*Gaines v. Stroufe*, 117 Fed. 965; *Foster v. Retail Clerks' International Protective Assn.*, 39 Misc. Rep. (N. Y.) 48, 78 N. Y. Supp. 860; 2 Current Law, top p. 444.) An injunction is inoperative until the undertaking required by the statute be given. (*Elliott v. Osbourne*, 1 Cal. 396; *Heyman v. Landers*, 12 Cal. 107; *McCracken v. Harris*, 54 Cal. 81.)

Forney & Moore, for Respondents.

Injunction will issue to restrain temporarily an act which will result in great damage to the plaintiff, although the injury is not irreparable, and notwithstanding that other remedies lie on behalf of the plaintiff. (*Staples et al. v. Rossi*, 7 Idaho, 618, 65 Pac. 67; *Wilson v. Eagleson*, 9 Idaho, 17, 71 Pac. 613; *Gilpin v. Sierra Nev. Con. Min. Co.*, 2 Idaho, 696, 23 Pac. 547, 1014.) An interlocutory injunction is not a matter of strict right. Its issuance rests in the sound discretion of the court, and the exercise of this discretion in granting and refusing the injunction will not, as a general rule, be reviewed on appeal or otherwise controlled or interfered with. (*Washington etc. Ry. Co. v. Coeur d'Alene Ry. etc. Co. et al.*, 2 Idaho, 439, 17 Pac. 142, 4 L. R. A. 409, and cases cited in the opinion of the court

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on page 441 [2 Idaho].) Nonjoinder of parties to an action is not in issue on an application for an injunction. (Rev. Stats. 1887, sec. 4113.) There is no nonjoinder of parties. (Rev. Stats. 1887, secs. 4101, 4102.) The court must in every stage of an action disregard any error or defect in the pleading or proceeding which does not affect the substantial rights of the parties (Idaho Rev. Stats., sec. 4231), and may allow a party to amend any pleading or proceeding by correcting any mistake therein. (Idaho Rev. Stats., sec. 4227.) The defendant having filed his answer to plaintiff's complaint, plaintiff was entitled, as a matter of right, to file the affidavit complained of. (Idaho Rev. Stats., sec. 4295; *Thayer et al. v. Bellamy et al.*, 9 Idaho, 1, 71 Pac. 544.)

SULLIVAN, C. J.—This action was brought to restrain the appellant from selling or disposing of certain personal property described in the complaint and for an accounting between the plaintiff and defendant, and for judgment for the value of any and all property unaccounted for by the defendant. Upon the verified complaint, the court ordered the defendant to show cause why an injunction should not issue as prayed for, making the same returnable at Grangeville, Idaho county, on the fifteenth day of September, 1904. And at the same time issued a temporary restraining order against the defendant, his agents and servants, restraining them from selling or transferring any of the said personal property. At that date the cause came on for hearing before the judge upon the rule to show cause why an injunction should not issue. The defendant, who is the appellant here, demurred to the complaint and answered, denying the material allegations of the complaint and moved to discharge the restraining order already issued and objected to the issuance of any injunction in said case. The matter proceeded to a hearing upon the verified complaint and answer of the appellant. On the argument the defendant maintained that no bond had been required before issuing the restraining order and that paragraphs 7, 8 and 10 of the complaint (which embraced all the equities of the bill) were on information and belief, or on belief, and that the sources of information or the grounds of belief were not stated, and that

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there was no affidavit in aid of the complaint. Thereupon the court indicated that the motion must be sustained, and the plaintiff then asked for further time to file affidavits in support of the complaint. The court granted such application over the objection of counsel for the appellant. The plaintiff subsequently filed his own affidavit, setting up the sources of information on which he based the allegations of the complaint and the grounds of his belief, and nothing more. The court thereafter took said motion under advisement and denied the same, and directed that the temporary restraining order theretofore issued remain in force upon the plaintiff filing an undertaking to the effect that he would pay the defendant such damages, not exceeding the sum of \$600, as he might sustain by reason of said injunction or restraining order, if the court should finally decide that the plaintiff was not entitled thereto. To all of which counsel for appellant then and there excepted. This appeal is from the order denying said motion and continuing the temporary injunction in force. For a clear understanding of this case we will here set forth the main facts out of which this action arose.

It appears from the record that on the twenty-third day of May, 1903, one E. N. Brown was the owner of one hundred and sixty acres of land situated in Latah county, Idaho, and also certain personal property consisting of livestock, both horses, cattle, hogs and farming implements, and that one Clara Brown, a widow, was the owner of one hundred and sixty acres of land situated in said county, and certain personal property. That on the twenty-third day of May, 1903, the said E. N. Brown and Clara Brown, as parties of the first part, and lessors, made and entered into a contract of lease with the appellant Grice, whereby they leased to the said Grice the said real estate together with said personal property for a term of five years, and appellant entered into the possession of said property, real and personal. It appears that on the sixth day of January, 1904, after the appellant had been placed in possession of said premises and personal property, said E. N. Brown sold and conveyed to the plaintiff the one hundred and sixty acres of land and personal property referred to above as belonging to him

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included in the said lease. And it is alleged that the appellant at all times had full and complete knowledge of said sale to the respondent. But this is denied by the answer. It is also alleged upon information and belief that the appellant had sold and disposed of a large amount of said described personal property and had converted the proceeds thereof to his own use, and at all times refused, and still refuses, to recognize the plaintiff as the owner of said real estate or said personal property, or any part or portion thereof, and refused to recognize respondent's rights or interest therein, and wholly ignores his rights in the premises; and that respondent had frequently requested the appellant to account to him for said personal property, but that he had at all times refused to do so, and had refused to account to respondent for any part or portion of the proceeds received from the sale of any of said personal property, upon the pretense and excuse that respondent had leased said property of Brown and had no dealings with the respondent; that from the conduct of the appellant and from his statements, he intends to convert to his own use the balance of said personal property, and that said personal property is reasonably worth the sum of \$1,500.

With the foregoing statement of facts, we will proceed to dispose of the assigned errors.

Counsel for appellant contends that the legal title to the livestock mentioned in said lease passed to the appellant, and that he did not have to account to the lessors for them or their increase until the termination of the lease, and for that reason said E. N. Brown could not sell the property set forth in said bill of sale. In order to decide this point, resort must be had to the terms of said lease.

From the many provisions of said lease, we only need to quote the following for a decision of this point, to wit: "That the said parties of the first part, in consideration of the covenants and agreements hereinafter specified, do hereby let and lease unto the said party of the second part, . . . and all the livestock and farm utensils of every name and nature now being in or upon the same and belonging to the said parties of the first part. . . .

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"For the use of said premises, and for the use of all the livestock, farming machinery and personal property thereon, the said second party hereby covenants and agrees to pay to said first parties an equal one-half share and interest in and to all the increase of livestock, in weight and number of head, now on said premises; that is to say, that the said party of the second part is to have an equal one-half share and interest in and to the increase of said livestock in both weight and numbers, and the said parties of the first part are to have the other equal one-half share and interest in and to the said increase. . . .

"It is further agreed by and between the parties herein that in case they fail to and cannot agree upon the terms and price of sale of the increase of said livestock, or any portion thereof, that in that event said parties will agree upon some disinterested person, and that the decision of said disinterested person upon the question submitted shall be binding upon said parties to this lease. . . .

"It is further agreed by and between the parties hereto that of the stock now on said premises, ten steer calves are of the value of \$10 per head, and that of four yearling steers, two are of the value of \$20 per head, and two of the value of \$15 per head, the total value of which steer calves and yearling steers shall be returned to said parties of the first part, along with one-half share of the difference between what said steer calves and yearling steers shall sell for and their present value. In this connection it is agreed and understood that said four yearling steers and ten steer calves are excepted from the stock now on said premises, and that are to be returned by said second party to said first parties at the expiration of the said lease. . . .

"It is also further agreed that should there be more grain, of any kind or nature, raised on said premises than is necessary to feed the livestock now on and to be on said premises, one-half of said surplus of grain shall be delivered to said parties of the first part on the premises, said first parties furnishing sacks necessary for holding their share of said grain."

It will be noted in the first paragraph above quoted from the lease it is stated that the "first parties let and lease unto the second party," and then follows a description of the real estate,

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and after that we find the following provision, to wit: "And all the livestock and farm utensils of every name and nature" mentioned in said lease. And from the second paragraph above quoted, it is stipulated that the appellant, "for the use of said premises and for the use of all the livestock, . . . agrees to pay to said first parties an equal share and interest in and to all the increase of livestock, etc." And the third paragraph provides as follows: "It is further agreed by and between the parties herein that in the case they fail to and cannot agree to the terms and price of sale of the increase of said livestock," in that event said parties would agree on a disinterested person to decide the difference.

And from the fourth paragraph above quoted it is stipulated that ten steer calves are of the value of \$10 per head, and that four yearling steers are worth \$20 per head, and two of the value of \$15 per head, and that the total value of such calves and yearling steers should be returned to the party of the first part along with one-half of the difference between what said steer calves and yearling steers shall sell for and their present value.

And it is further stipulated that if there is more grain raised on said premises than is necessary to feed said livestock, one-half of the surplus should be delivered to said party of the first part on the premises, said first parties furnishing sacks necessary to hold their share of the grain.

From all of those provisions it is clear that the title to the livestock did not pass to the appellant, and it was not intended that of the increase of said livestock the appellant could sell the same and retain the proceeds thereof until the termination of this lease. But the clear intention was that when any of the increase of said livestock was sold, the share thereof belonging to the lessors must be paid over to them. And at the termination of said lease the lessee should return to the lessors the number, quality and kind of livestock received by him from them.

It would be a most violent construction of the terms of said lease to hold that the lessee could sell the increase of said livestock and retain the lessor's share thereof until the termination of the lease, and we cannot so construe it.

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It is contended that it was error to grant a restraining order on a verified complaint where the main allegations were made on information or belief without stating the sources of information or the basis of the belief, and in support of that contention cites *Gains v. Sroufe et al.*, 117 Fed. 965. That was a suit for the infringement of a trademark. The allegations of the bill were upon information and belief, and it is there stated that courts of equity in granting relief by injunction in trademark cases proceed upon the ground of fraud, and it is a general rule that whatever is essential to the rights of the complainant is necessarily within his knowledge and ought to be alleged positively and with precision. That case is not in point here. In the case at bar, some of the allegations are positive and those made upon information and belief, the sources of information and the basis of belief are set forth in the affidavit filed by the respondents in the case, and that is sufficient.

It is contended that the restraining order first issued by the judge was inoperative for the reason that no undertaking was given. That we think is correct, as an undertaking should have been given before the restraining order became operative. However, on the hearing of the order to show cause, the injunction was continued on condition that the respondents file an undertaking in the sum of \$600, and, if respondent has not done so, there is no injunction pending. The failure to give a bond at the time the temporary injunction was issued would not prevent the judge or court from granting a temporary injunction on the hearing of the order to show cause.

It is also contended that the demurrer to the complaint should have been sustained. It is sufficient to say that we think the complaint states a cause of action and that there is no misjoinder of parties. The judge did not pass upon the demurrer as he had no authority to do so at chambers. But if the complaint did not in fact state a cause of action, an injunction should not have been issued.

It is contended that the restraining order should have been discharged, for the reason that the answer denied all the equities set forth in the complaint. It is true that under certain authorities where the equities of the complaint or bill are fairly

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and squarely denied, a restraining order will not be granted, or if one has been issued, it will not be continued in force. That rule does not necessarily obtain in this state. Section 4288, Revised Statutes, provides *inter alia* that: "An injunction may be granted in the following cases: 1. When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of either for a limited period or perpetually; 2. When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, great or irreparable injury to the plaintiff; 3. When it appears during the litigation that the defendant is doing, or threatens or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action tending to render the judgment ineffectual." That section does not prohibit the granting of an injunction where the equities of the complaint are all denied by the answer. It is stated in section 1148, 2 Spelling on Injunctions and Extraordinary Remedies, that all of the authorities agree that the granting or dissolving of an injunction, where the facts are in dispute, is within the discretion of the chancellor, nor will the action of the chancellor be reversed unless it is claimed that he has committed an error or abused a sound judicial discretion. It is stated therein as follows: "And where upon the hearing of an order to show cause why a preliminary injunction should not be continued, the plaintiff was allowed by the judge to read new affidavits supporting his complaint, and explaining the affidavits on the part of the defendants, answering the facts set forth in the original application, this was considered to be the exercise of discretion by the judge, which could not be reviewed upon appeal from the order continuing the injunction." And again in section 22 of the last-cited authority it is stated: "The right to a preliminary injunction is generally addressed to the sound discretion of the court, to be exercised according to the circumstances of each case." There is no merit in this contention of counsel.

It is also contended that the injunction should have been denied on the ground that the respondent had a plain, speedy

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and adequate remedy at law. It was held by this court in *Staples v. Rossi*, 7 Idaho, 618, 65 Pac. 67, that an "injunction will issue to restrain, temporarily, an act which will result in great damage to the plaintiff, although the injury is not irreparable, and notwithstanding that other remedies lie in behalf of the plaintiff." In *Meyer v. First Nat. Bank*, ante, p. 175, 77 Pac. 334, this court said: "It is true that they had their remedy for damages, but under our statute (Rev. Stats., sec. 4288), a party is not under the necessity of waiting until his property has been damaged and destroyed, and his business disorganized, and his premises encroached upon to the extent of his own ouster, and then resort to an action at law for redress." We think that the correct rule under the provisions of our statute.

It is contended that E. N. Brown and Clara Brown were partners in the lease referred to, and that the purported bill of sale by E. N. Brown to respondent had no connection whatever with the partnership, and that by it Brown did not sell or pretend to sell his interest in the partnership. The record before us does not indicate that E. N. Brown and Clara Brown were partners. It shows that E. N. Brown was the son of Clara Brown; that each owned one hundred and sixty acres of land separate and distinct from each other, and that they each own separately a part of the personal property leased to the appellant.

That being true, there is no question but what E. N. Brown had a right to sell and dispose of the property belonging to him included in said lease, and that the purchaser would be entitled to all of the rights under said lease that Brown had. And for that reason Clara Brown was not a necessary party to this action. For all that appears from the record, the appellant had accounted to her for her entire share of the products and stock sold or disposed of under the terms of said lease.

The respondent is entitled to all of the rights under said lease that E. N. Brown was entitled to thereunder. The order of the court appealed from is sustained.

Costs of this appeal are awarded to respondent.

Stockslager, J., and Ailshie, J., concur.

Argument for Appellants.

(December 31, 1904.)

SHIELDS v. JOHNSON.

[79 Pac. 394.]

INJUNCTIONS PENDENTE LITE—TO RESTRAIN TRESPASS—LARGELY DISCRETIONARY.

1. A large discretion is vested in the trial court in the granting of temporary injunctions to hold property *in statu quo* pending the determination of the action, and its exercise will not be reversed on appeal unless a clear abuse is shown.

2. Courts of equity should hesitate before granting injunctions to restrain trespass committed under color of title or right.

3. The statute (Rev. Stats., sec. 4288) authorizing the issuance of injunctions is liberally construed by the courts.

(Syllabus by the court.)

APPEAL from District Court in and for Latah County.
Honorable Edgar C. Steele, Judge.

From an order granting an injunction *pendente lite* and an order refusing to dissolve such injunction, defendants appeal.
Affirmed.

George W. Pickett and Stewart S. Denning, for Appellants.

Where defendant is in possession of ground in dispute, an injunction will not be granted, but the parties will be left to their remedy at law. (*Washington etc. Co. v. Coeur d'Alene Ry.*, 2 Idaho, 580, 21 Pac. 562.) Where a party seeks relief by interlocutory injunction, he should show some clear, legal or equitable right, and an apprehension of immediate injury to those rights. Where none such are shown, the injunction will be denied. (*McGinnis et al. v. Friedman*, 2 Idaho, 393, 17 Pac. 635; *Waldron v. Marsh et al.*, 5 Cal. 119.) There must be an urgent necessity, and, as a general rule, the title and right of the plaintiffs should be shown to be clear, well established and not in dispute. The application should also be made promptly and not delayed until large expenditures have been made by the defendants. (*Real Deal Min. Co. v. Pond Min. Co.*, 23 Cal. 85; *Pomeroy's Equity Jurisprudence*, secs. 418, 419, 817, 1359; 10

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Am. & Eng. Ency. of Law, p. 802, under "Injunctions," and subd. 12, "Laches," and notes.) The absence of a plain and adequate remedy at law affords the only test of equity jurisprudence, and the application of this principle to a particular case must depend altogether upon the character of the case as disclosed in the proceedings. (10 Am. & Eng. Ency. of Law, p. 878, "Injunctions," subject "Trespass," subd. "Test of Jurisdiction," and notes; *Aveline v. Ridenbaugh*, 2 Idaho, 168, 9 Pac. 601; *Dewitt v. Hays*, 2 Cal. 463, 56 Am. Dec. 352; *Tomlinson v. Rubio*, 16 Cal. 203; *Tavis v. Ellis*, 25 Cal. 515; *Leach v. Day*, 27 Cal. 644; *Richards v. Kirkpatrick*, 53 Cal. 433.)

Forney & Moore, for Respondent.

Injunction will issue to restrain temporarily an act which will result in great damage to the plaintiff, although the injury is not irreparable, and notwithstanding that other remedies lie on behalf of the plaintiff. (*Staples et al. v. Rossi*, 7 Idaho, 618, 65 Pac. 67; *Wilson v. Eagleson*, 9 Idaho, 17, 71 Pac. 613; *Gilpin v. Sierra Nev. Con. Min. Co.*, 2 Idaho, 696, 23 Pac. 547, 1014.) An interlocutory injunction is not a matter of strict right. Its issuance rests in the sound discretion of the court, and the exercise of this discretion in granting and refusing the injunction will not, as a general rule, be reviewed on appeal, or otherwise controlled or interfered with. (*Washington etc. Ry. Co. v. Coeur d'Alene Ry. & Nav. Co. et al.*, 2 Idaho, 439, 17 Pac. 142, 4 L. R. A. 409, and cases cited in the opinion of the court on page 441 [2 Idaho]; 16 Am. & Eng. of Law, 2d ed., p. 358, and authorities cited.)

AILSHIE, J.—This is an appeal from an order made by the district judge on the eighth day of August, 1904, refusing to dissolve a temporary restraining order theretofore issued, and making and entering his further order continuing in force such restraining order during the pendency of the action. The action was commenced on the eighteenth day of July, 1904, by the plaintiff, M. J. Shields, against the defendants, praying for an injunction against the defendants restraining them from cutting, removing or interfering with the plaintiff's crops growing upon a certain one hundred and sixty acre tract of land which

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plaintiff had leased from the defendant Johnson, and for an order restraining the defendants from interfering with the plaintiff's leasehold estate in and to the tract of land and for damages for trespasses committed. Upon the filing of the complaint a temporary restraining order was issued and an order to show cause why the same should not be continued in force pending the litigation was at the same time issued and served. Thereafter the defendants moved to dissolve the injunction and quash the writ that had been issued, which motion was heard at the same time and with plaintiff's motion to continue the order in force pending the action. After the hearing the trial judge made and entered his order continuing the injunction in force upon the execution and delivery of a good and sufficient bond by the plaintiff in the sum of \$300.

On the tenth day of October, 1900, the defendant, Frank M. Johnson, and his wife, Emma A. Johnson, by an instrument in writing, leased and let unto the plaintiff their one hundred and sixty acre tract of land situated in Latah county, for the period of four years, for an annual rental of \$250, payable on or before the first day of November each year. This lease also contained an option whereby the lessee might continue in possession of the premises for an additional period of two years upon paying a rental of \$300 per annum, and it contained a further option whereby the lessee might purchase the farm, upon compliance with certain conditions, for the sum of \$4,500. Plaintiff alleged that after entering into the possession of this tract of land he caused the same to be farmed and cultivated and part of it sown in alfalfa and the remainder in *Bromus Innermis*, and that while these grasses were growing upon the land the defendants entered and plowed up some eighty acres and sowed oats thereon, and that at the time of the commencement of this action the defendants were cutting and removing the grasses and oats to the damage of the plaintiff in the sum of \$2,000. The plaintiff also filed an affidavit showing that the defendants were wholly insolvent and unable to respond to any judgment for damages, and that the defendant Johnson and his wife had filed a statutory homestead upon such tract of land. The defendants claim by their answer, and affidavits filed in support thereof, that they

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entered the premises after a breach of the terms of the lease by the plaintiff and in pursuance of the stipulation contained in the lease. They also filed affidavits tending to show that they were not wholly insolvent, but were able to respond in damages in at least the sum of \$500. After an examination of the record, it is sufficient to say that we feel about this case very much as was expressed by Chief Justice Beatty in *Gilpin v. Sierra Nevada Con. Min. Co.*, 2 Idaho, 709, 23 Pac. 547, wherein he said: "Admitting the defendant is right, the inconvenience to it from an injunction will be less than will be the damage to the plaintiff should he prove to be right." Considerable discretion is allowed in the granting of temporary injunctions to hold property *in statu quo* pending the litigation where a good and sufficient bond is required of the plaintiff for the protection of the defendant in case it should develop upon the trial that the plaintiff is in the wrong. (1 Spelling on Extraordinary Relief, sec. 22.) While courts are not very free to grant injunctions to restrain trespass where it is committed under color of title or right (1 Spelling on Extraordinary Relief, secs. 336-364), still in this case there was pretty strong evidence submitted by the plaintiff tending to show the inability of the defendants to respond to any judgment for damages in case the plaintiff should secure such a judgment against them. It should also be observed that our statute authorizing these injunctions is broader and more liberal than most statutes, and has received a quite latitudinous construction from this court. (*Gilpin v. Sierra Nevada Con. Min. Co.*, *supra*; *Staples v. Rossi*, 7 Idaho, 618, 65 Pac. 67; *Wilson v. Eagleson*, 9 Idaho, 17, 71 Pac. 613; *Myer v. First Nat. Bank*, *ante*, p. 175, 77 Pac. 334; *Price v. Grice*, *ante*, p. 443, 79 Pac. 389.) We do not think the trial judge abused his discretion in granting the injunction and refusing to dissolve the same.

For the foregoing reasons the order appealed from will be affirmed. Costs awarded to respondent.

Sullivan, C. J., and Stockslager, J., concur.

Opinion of the Court—Stockslager, C. J., on Rehearing.

ON REHEARING.

(January 30, 1905.)

STOCKSLAGER, C. J.—Counsel for appellants file a petition for rehearing in this case, and very earnestly insist that they are entitled to be again heard. “1. That the plaintiff had a plain, speedy and adequate remedy at law; and 2. That the plaintiff was guilty of such laches under the statement of facts in this case that would preclude him from obtaining a preliminary injunction.” Owing to the earnestness, and we believe candor, of appellants’ application for a rehearing, we have again gone over the entire record and briefs filed and submitted on the hearing of the case on its merits.

Taking up the first proposition that the plaintiff had a plain, speedy and adequate remedy at law, this question is answered by the opinion, wherein it is said “that the plaintiff has commenced his action for \$2,000 damages against the defendant and filed an affidavit showing that defendants were wholly insolvent and unable to respond to any judgment for damages, and that defendants Johnson and his wife had filed a statutory homestead upon such tract of land.” It is also stated in the opinion that defendants filed affidavits tending to show that they were not wholly insolvent, but were able to respond in at least \$500 damages. I apprehend this showing was what prompted the learned trial judge to order the writ. It was shown that defendants went upon the land leased by the Johnsons to plaintiff and plowed up about fifty acres of said land sown with *Bromus Innermis*, and sowed thereon a crop of oats and also plowed up the forty acres of land sown to alfalfa. After this and about July 11, 1904, without plaintiff’s knowledge or consent, defendants entered upon said premises and cut down about forty acres of the said grass sown and known as *Bromus Innermis*. With an action pending for \$2,000 damages against the defendants and an allegation of their insolvency, with a counter-showing that defendants were able to respond in \$500 damages, showing that ninety acres of land sown in grass had been plowed up and the grass cut from forty acres more, evidently impressed the court with the idea that the defendants were unable to re-

Points decided.

spond in damages already inflicted if the plaintiff was able to sustain the allegation of his complaint which was verified.

As to the next reason urged, "that the plaintiff was guilty of such laches under the statement of facts in the case that would preclude him from obtaining a preliminary injunction," we cannot give our assent to this proposition. The plaintiff had been placed in possession of the Johnson farm under a lease for a term of years that had not expired. The Johnsons had attempted to forfeit the lease by another action in the district court, in the judgment of which it was adjudged that plaintiff in this action was indebted to defendants Johnson in this action in a certain sum of money, the court holding that the amount of money due plaintiff in that action against plaintiff in this action was for rent, and not an action to declare a forfeiture of the lease. This being true, the Johnsons and their employees were trespassers when they entered the land for the purpose of plowing up the crops there grown upon the land, or for the purpose of cutting down the crops, but plaintiff was not confined to that remedy alone. We are still of the opinion that this was a proper case for an injunction under the facts in this case, and a rehearing is denied.

Ailshie, J., and Sullivan, J., concur.

(December 31, 1904.)

GRICE v. WOODWORTH.

[80 Pac. 912.]

CONVEYANCE BY MARRIED WOMEN—SALE OF HOMESTEAD—CONSTRUCTION OF STATUTES.

1. Where W. and W., husband and wife, enter into an oral contract for the sale of their homestead, and the purchaser takes possession thereof, and pays the purchase price and makes valuable improvements thereon, all of which are done with the full knowledge and consent of the wife, the purchaser is entitled to a decree requiring them to convey said premises to him.

Argument for Appellant.

2. The provisions of sections 2921, 2922, 3040 and 3041, of the Revised Statutes, were enacted for the purpose of protecting the homesteads and other rights of married persons, particularly the wives, and were not intended to operate as a shield to relieve against a fraudulent transaction on their part.

3. Sections 3040 and 3041, Revised Statutes, are in their nature rules of evidence and are subject to the same legal principles as are conveyances falling under the statute of frauds and the rules of equitable estoppel and waiver.

(Syllabus by the court—Ailshie, J., dissenting.)

APPEAL from the District Court of Latah County. Honorable Edgar C. Steele, Judge.

Action to enforce specific performance of contract. Judgment for defendant. Reversed.

The facts are fully stated in the opinion.

R. V. Cozier and Stewart S. Denning, for Appellant.

A party who, under a verbal contract, has purchased real estate, gone into possession, made valuable improvements thereon and paid the purchase price, is entitled to a specific performance of the contract. (Rev. Stats., sec. 6008; *Wait on Fraudulent Conveyances and Void and Voidable Acts*, 2d ed., secs. 436, 437; 2 *Lomax's Digest*, 41; *Thomas v. Dickenson*, 12 N. Y. 364; *Holland v. Hoyt*, 14 Mich. 238; *Butler v. Lee*, 11 Ala. 885, 46 Am. Dec. 230; *Wilkinson v. Scott*, 17 Mass. 249; *Linscott v. McIntire*, 15 Me. 201, 33 Am. Dec. 602; *Gibson v. Wilcozen*, 16 Ind. 333; *Bowen v. Bell*, 20 Johns. (N. Y.) 338, 11 Am. Dec. 286; *Stowell v. Tucker*, 7 Idaho, 312, 62 Pac. 1033.) Sections 3040 and 3041 of the Revised Statutes of 1887, covering the conveyances and abandonment of the homestead, are simply rules of evidence and are controlled by the same legal principles as conveyances falling under the statute of frauds. (*Andola v. Picott*, 5 Idaho, 27, 46 Pac. 928; *Stowell v. Tucker*, 7 Idaho, 312, 62 Pac. 1033; *Law v. Butler*, 44 Minn. 482, 9 L. R. A. 856, 47 N. W. 53; *Walker v. Kelly et al.*, 91 Mich. 212, 51 N. W. 934; *Harkness v. Burton*, 39 Iowa, 101.) Where an execution is levied upon a homestead, and the parties entitled to the

Argument for Appellant.

homestead exemption stand passively by and make no objection to the sale, and allow a party to part with his money for the purchase of the premises, they are estopped against him from setting up the homestead character of the land. (*Kimball v. Salisbury*, 19 Utah, 161, 56 Pac. 973; *Griffin v. Nichols*, 51 Mich. 575, 17 N. W. 63; *Imhoff v. Lipe*, 162 Ill. 282, 44 N. E. 493; *Gallager v. Keller* (Tex. Civ. App.), 30 S. W. 248.) Where an oral conveyance of land is made which ought to have been in writing, and acknowledged under the statute of frauds in a state, and the vendee has been placed in possession of the property by the vendor and paid the purchase price, if there be nothing illegal or immoral in the transaction, a court of equity will decree specific performance of the verbal contract. (*Andola v. Picott*, 5 Idaho, 27, 46 Pac. 928; *Von Rosenberg v. Perrault*, 5 Idaho, 719; *Stowell v. Tucker*, 7 Idaho, 312, 62 Pac. 1033; *Grimshaw v. Belcher*, 88 Cal. 217, 22 Am. St. Rep. 298, 26 Pac. 84; Fry on Specific Performance, 259, 260; Bigelow on Estoppel, 3d ed., 470, 513; *Gilbert v. American Surety Co.*, 121 Fed. 499; *Manchester etc. R. Co. v. Concord R. R. Co.*, 66 N. H. 100, 49 Am. St. Rep. 582, 20 Pac. 383, 9 L. R. A. 689; *Drake v. Painter*, 77 Iowa, 731, 42 N. W. 526; *Winkleman v. Winkleman*, 79 Iowa, 319, 44 N. W. 556; *Allbright v. Hannah*, 103 Iowa, 98, 72 N. W. 421; *Anderson v. Cosman*, 103 Iowa, 266, 64 Am. St. Rep. 177, 72 N. W. 523.) The statute of frauds applies to executory and not to executed contracts. (*Coffin v. Bradbury*, 3 Idaho, 770, 95 Am. St. Rep. 37, 35 Pac. 715.) The rule of estoppel is that one who, with knowledge, accepts the proceeds of an unauthorized sale of his property, is estopped to dispute the validity of the sale. (*Escolle v. Franks*, 67 Cal. 137, 7 Pac. 425; *Goodman v. Winter*, 64 Ala. 410, 433, 38 Am. Rep. 13; *France v. Haynes*, 67 Iowa, 139, 25 N. W. 98; *Moore v. Hill*, 85 N. C. 218; *Field v. Doyon*, 64 Wis. 560, 25 N. W. 653; *Booth v. Wiley*, 102 Ill. 84, 107.) A vendor who has refused to execute a conveyance of real estate cannot recover for use and occupation against a purchaser who has occupied the same under an oral agreement for the purchase thereof, if the purchaser is able and willing to perform the contract. (Hammond on Contracts, sec. 313.) A wife

Argument for Respondents.

is estopped from claiming that she did not join in the conveyance. (*Mudgett v. Clay*, 5 Wash. 103-111, 31 Pac. 424; *Norton v. Nichols*, 35 Mich. 149; *Godfrey v. Thornton*, 46 Wis. 679, 1 N. W. 362; *Saxton v. Wheaton*, 8 Wheat. 239, 5 L. ed. 607; *Brooks v. Barker*, 6 Johns. Ch. 166; *Anderson v. Cosman*, 103 Iowa, 266, 64 Am. St. Rep. 177, 72 N. W. 523.)

Forney & Moore, for Respondents.

The crucial or pivotal question in this case is simply this: Will the courts of Idaho compel the specific performance of an oral agreement made with a husband for the sale of the homestead without the wife being a party to such agreement? The law governing the sale of homesteads by married women may be found in the following sections from the Revised Statutes, namely, sections 2921, 2922, 3040, 3041 and 2505. The statutes of Idaho specifically declare how the sale of a homestead may be made. This method of procedure excludes all others. (*Barton v. Drake*, 21 Minn. 305; *Law v. Butler*, 44 Minn. 482, 47 N. W. 53, 9 L. R. A. 858.) This question has frequently been before the courts of California, and the supreme court of that state has uniformly held, under statutes identical with Idaho, that a married woman can only be divested of her estate in the manner prescribed by statute, and that the homestead can only be conveyed in the mode prescribed by statute. (*Matthews v. Davis*, 102 Cal. 207, 36 Pac. 358; *Jackson & Thomas v. Torrence*, 83 Cal. 533, 23 Pac. 695; *Cohen v. Davis*, 20 Cal. 195; *California Fruit Trans. Co. v. Anderson*, 79 Fed. 404; *Security Loan Co. v. Kauffman*, 108 Cal. 218, 41 Pac. 467; *Gleason v. Spray*, 81 Cal. 217, 15 Am. St. Rep. 47, 22 Pac. 551; *Barber v. Babel*, 36 Cal. 14; *Mellen v. McMannis*, 9 Idaho, 418, 75 Pac. 98.) We believe it to be the universal rule that if damages at law will be adequate compensation for the breach of a contract, specific performance will not be decreed. (*Senter v. Davis*, 38 Cal. 450.) The respondents in the present case claim that the doctrine announced in the case of *Morrison v. Wilson*, 13 Cal. 495, 73 Am. Dec. 593, that fraud may vitiate all contracts, but when applied to married women it will not divest a married woman's title in

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the face of a statute declaring different and exclusive mode of divestiture, and a wife, under the Idaho and California statutes, cannot make a husband's contract effectual by any act which does not amount to affixing her signature to it and properly acknowledging the same. (*Kantrowitz v. Prather*, 31 Ind. 92, 99 Am. Dec. 587.) Judge Agnew said in *Glidden v. Strupler*, 52 Pa. St. 402, in speaking of a married woman's void deed: "Equity cannot breathe life into a legal nonentity." (1 Story's Equity Jurisprudence, par. 177; Herman on Estoppel, par. 1099; *Mattox v. Hightshue*, 39 Ind. 95; *Rogers v. Higgins*, 48 Ill. 211.)

SULLIVAN, C. J.—This is an action to compel specific performance of a contract for the conveyance of real estate situated in Moscow, Latah county. It appears from the record that the respondents are husband and wife, and that on the seventh day of January, 1895, the husband purchased the east one-half of lots 4, 5 and 6, in block 2, Fry's addition to the town of Moscow, Latah county, and the consideration paid therefor was money acquired by the respondent, Jay Woodworth, subsequent to the marriage of the respondents; that on the twentieth day of March, 1895, while respondents were residing on said premises and occupying the same as a homestead, the respondent, Lillie I., filed her declaration of homestead upon said premises; that sometime prior to the thirtieth day of August, 1901, the respondents had removed from Moscow, in the county of Latah, to Wallace, in the county of Shoshone, and that respondent Woodworth had listed said property for sale with real estate agents residing and doing business in said town of Moscow, at the price of \$1,500; and on said last-mentioned date the appellant paid to said agents for the respondent \$25 for a thirty-day option to purchase said premises, and thereafter, on the twentieth day of September, the appellant took up said option and orally promised the said agents to purchase said premises and to pay the sum of \$1,500 therefor as follows, to wit: To assume a mortgage upon said premises executed by the respondents to the Vermont Loan and Trust Company, to secure the payment of \$950, together with interest thereon and \$550 in

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cash, and thereupon, with the consent of said agents, the appellant entered into the possession of said premises and moved his family into the residence situated upon said premises, and has ever since occupied the whole of said premises as a residence, all of which was known to the respondents; that instead of paying said \$550 as agreed, the same was paid in payments as follows: November 1, 1901, \$100; December 1, 1901, \$175; January 4, 1902, \$100; July 6, 1902, \$100; September 16, 1902, \$100—aggregating in all the total sum of \$525. Said sums were paid over by the agents to the respondent, Jay Woodworth; that after said payments were made, the appellant personally demanded of Jay Woodworth a deed to said premises and offered to pay him then and there the \$25 still due on the purchase price, with interest on all deferred payments, and the said Woodworth promised to execute a conveyance to said premises as soon as he conveniently could; that after the appellant had entered into possession of said premises, he made improvements thereon of the value of \$250; that after appellant had so entered into the possession, the respondent, Lillie I., was informed of the improvements made thereon and knew that said improvements had been made and possession taken by the appellant under the belief that he was the owner of said premises, and to all of which said Lillie I. made no objection and consented thereto; thereafter, in the month of March, 1903, the appellant again tendered the respondents the sum of \$25 as the balance still due on the purchase price, and demanded of them that they execute to him a good and sufficient deed of conveyance to said premises, which demand the respondent then and there refused, and the respondent, Jay Woodworth, when asked his reason for refusing to execute the deed, informed the appellant that he had consulted with attorneys and they had advised him that he could not be compelled to make the deed; that the payments made by appellant, including the \$525 referred to, together with interest on said mortgage, taxes and the improvements made by appellant make a total of \$1,181.57.

Upon the foregoing facts, judgment was rendered in favor of the respondents decreeing to them the possession of said premises and granting to the appellant judgment of \$844.72,

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that being the balance after deducting the rental, at the rate of \$12.50 per month, with interest thereon, from the sum of \$1,181.57 above mentioned. The case was decided upon the theory that a specific performance of the contract of sale could not be enforced because of the provisions of our statute in regard to the conveyance of real estate by married women.

The question presented for decision is whether the respondents should be compelled to convey said property to the appellant under the facts of this case, it having been at one time occupied as a homestead. The sections of our statute in regard to the conveyance or encumbrance of a homestead by a married person and the manner in which a homestead may be abandoned, are as follows:

“Sec. 2921. No estate in the homestead of a married person, or any part of the community property occupied as a residence by a married person can be conveyed or encumbered by act of the party, unless both husband and wife join in the execution of the instrument by which it is so conveyed or encumbered, and it be acknowledged by the wife as provided in chapter III of this title.

“Sec. 2922. No estate in the real property of a married woman passes by any grant or conveyance purporting to be executed or acknowledged by her, unless the grant or instrument is acknowledged by her in the manner prescribed in chapter III of this title, and her husband, if a resident of the territory, joins with her in the execution of such grant or conveyance.”

“Sec. 3040. The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife.

“Sec. 3041. A homestead can be abandoned only by a declaration of abandonment, or a grant or conveyance thereof, executed and acknowledged: 1. By the husband and wife, if the claimant is married; 2. By the claimant, if unmarried.”

Prior to the adoption of section 3041 above quoted, creditors of the homesteader often attached the premises homesteaded and attempted to subject the same to the payment of the debt

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on the ground of abandonment, and in order to make the homestead more secure, a rule of evidence was established by the adoption of said section, and any litigant, attempting to subject the homestead to the payment of his debt must show that the same was abandoned by a written declaration of abandonment properly executed and acknowledged. The provisions of that section are not applicable to the case at bar.

The case of *Mellen v. McMannis*, 9 Idaho, 418, 75 Pac. 98, decided by this court, is not in point. In that case it was not shown that the purchaser ever went into the possession of the premises, or put any improvements thereon, or that Clark ever accepted the purchase price thereof, or that his wife ever knew anything about the sale, or ever consented thereto.

Sections 3040 and 3041 are in the nature of rules of evidence, and are subject to the same legal principles as are conveyances falling under the statute of frauds, and the rules of equitable estoppel and waiver. We are aware that there is much conflict among the decisions on the question of how far the doctrine of equitable estoppel applies to married women. One of the leading decisions of the Pacific Coast states is that of *Morrison v. Wilson*, 15 Cal. 495. (See, also, cases cited in 1 Notes on California Reports, pp. 604, 605.) In section 814, 2 Pomeroy's Equity Jurisprudence, it is stated as follows: "Upon the question how far the doctrine of equitable estoppel by conduct applies to married women, there is some conflict among the decisions. The tendency of modern authority, however, is strongly toward the enforcement of the estoppel against married women as against persons *sui juris*, with little or no limitation on account of their disability. This is plainly so in states where the legislation has freed their property from all interest or control of their husbands, and has clothed them with partial or complete capacity to deal with it as though they were single. Even independently of this legislation there is a decided preponderance of authority sustaining the estoppel against her, either when she is attempting to enforce an alleged right, or to maintain a defense." The author cites modern English cases, as well as American, to sustain the text.

In the case of *Galbraith v. Lunsford*, 87 Tenn. 89, in referring to *Morrison v. Wilson*, *supra*, the Tennessee court says that the

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case of *Morrison v. Wilson*, *supra*, “relied on so confidently by counsel for complainant, seems to not only deny the application of an estoppel *in pais* to a married woman, but goes so far as to hold that affirmative fraud on her part will not effect that result. It is sufficient to say of this case, that it not only loses sight of the distinction referred to as to defective execution of a contract, but is directly opposed to our own adjudged cases so far as the element of fraud is concerned.”

In *Pilcher v. Smith*, 2 Head (Tenn.), 208, it is said: “The legal disability of coverture carries with it no license or privilege to practice fraud or deception on other persons.”

The provisions of our statutes above quoted must not be so construed as to permit the respondent, Lillie I., to reap the benefits of a fraud perpetrated on the appellant. It must be borne in mind that there is no conflict in the evidence in this case whatever.

The legal disability of married women in this state has been almost entirely removed. They have been given elective franchise; they may hold office, and under the second section of an act approved March 9, 1903 (Sess. Laws 1903, p. 345), the wife is given the management, control and absolute power of disposition of her separate property, with like effect as a married man may in relation to his real and personal property. It is true that said act was passed subsequent to the contract involved in this suit, but this only tends to show and support the doctrine laid down in 2 Pomeroy's Equity Jurisprudence above cited.

As to the statute of frauds, section 6007, Revised Statutes, provides that no estate or interest in real property, other than for leases having a term not exceeding one year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized in writing. It is conceded that no instrument in writing has been executed in this case. Section 6008, Revised Statutes, provides that the section above

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cited must not be construed to affect the power of a testator in the disposition of his real property by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law, nor to abridge the power of any court to compel the specific performance of an agreement, in case of part performance thereof. In the case at bar it is shown that the contract sued on is an executed contract so far as appellant is concerned. Hence, so far as the statute of frauds is concerned, the trial court should have compelled the respondents to convey the property in controversy by good and sufficient deed to the appellant. Courts of equity will not permit the statute of frauds, or the statute in regard to conveyances of married women, to be a shield to protect fraud, and those statutes were not enacted to encourage frauds and cheats. The appellant had paid the price agreed to be paid for the property, had taken possession thereof and expended \$250 in improving the same, all of which was assented to by respondent, Lillie I., and under the well-established rules of law applicable to the case, the appellant is the owner of the equitable title thereto. Because of the facts of this case the principle that governs is more in the nature of an estoppel or waiver on the part of respondent, Lillie I., and not the broad principle of abandonment as suggested by the provisions of section 3041, Revised Statutes, above quoted. While the provisions of the sections above quoted were made for the protection of married women, they were not intended to operate as a shield to relieve them against a fraudulent transaction such as the one under consideration, and she is estopped by her own acts from interposing the provision of said sections as a valid defense to this action. The verbal agreement for the transfer of the homestead in question was assented to by both husband and wife, and was followed by change of possession and permanent improvement placed thereon by the purchaser and a payment of the purchase price. Those acts operated to transfer the equitable title to the appellant. That being true, a court of equity will compel the respondents to convey the legal title to the appellant.

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The judgment is reversed and the cause remanded for further proceedings in conformity with the views herein expressed. Costs are awarded to appellant.

Stockslager, C. J., concurs.

AILSHIE, J., Dissenting.—If it should be conceded, which I am not now prepared to do, that the doctrine of estoppel *in pais* can be applied to a married woman in this state, still I do not think the conduct of the wife as shown in this case is sufficient to establish an estoppel against her. It is clear from the record that the appellant did not contract with the husband or part with his money upon any representation or action of the wife, and she cannot therefore be charged with any acts of fraud. It is equally clear, without citation of authority, that the wife should not be held for the fraudulent acts of her husband in which she has not participated. For this reason the judgment should be affirmed.

ON REHEARING.

(May 13, 1905.)

STOCKSLAGER, C. J.—Counsel for petitioner filed a lengthy petition setting up many reasons why a rehearing should be granted. The earnestness of the petition and well-known ability of counsel representing her prompted the court to hear further argument, and a rehearing was granted. Briefs were filed and arguments heard at the March term at Lewiston. The questions discussed are, first, as to the estoppel of Mrs. Woodworth; secondly, that of fraud on her part. These questions were discussed on the hearing and were considered by the court from every standpoint before the opinion was finally agreed upon. We agree that the legislature of this state has uniformly dealt kindly, and we think fairly, in protecting married women in their property rights. In this legislation for her protection it was not intended to shield her in any wrongful act. Under the facts in this case which are fully stated in the opinion by Mr. Chief Justice Sullivan, I do not think she can escape the doctrine of equitable estoppel. Counsel for petitioner call our attention to a number of authorities, among them being sec-

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tion 813, Pomeroy's Equity Jurisprudence, volume 2. We quote the section from their brief: "The measure of the operation of an estoppel is the extent of the representations made by one party and acted upon by the other. The estoppel is commensurate with the thing represented and operates to put the party entitled to its benefit in the same position as if the thing represented were true.

"With respect to the persons who are bound by or who may claim the benefit of the estoppel, it operates between the immediate parties and their privies, whether by blood, by estate or by contract. A stranger who is not a party or a privy can neither be bound nor aided. Since the whole doctrine is a creation of equity and governed by equitable principles, it necessarily follows that the party who claims the benefit of an estoppel must not only have been free from fraud in the transaction, but must have acted with good faith and reasonable diligence, otherwise no equity will arise in his favor." Apply this rule to the party claiming exemption from the doctrine of estoppel, and what is her standing in a court of equity? She knew the defendants—appellants—entered into the possession of the property, put valuable improvements thereon, and paid all but \$25 of the agreed purchase price, and then when he demands a deed comes into a court of equity and asks for relief under a plea that she had filed a homestead declaration on the property, he offering to allow plaintiff to take judgment for amount found due the plaintiff after deducting rental for the property for the time it was occupied by plaintiff, and she asking to be dismissed with her costs.

Under the rule laid down by Mr. Pomeroy, above quoted, it is immaterial whether there was an allegation or proof of fraud on the part of the defendants or not. He says: "The party who claims the benefit of an estoppel must not only have been free from fraud in the transaction, but must have acted in good faith and reasonable diligence, otherwise no equity will arise in his favor." Now, what was the duty of Mrs. Woodworth when she visited the premises in dispute and found them occupied by appellant and his family, making valuable and lasting improvements upon the house in good faith, believing

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they were the owners thereof? Mrs. Grice, wife of appellant, testifies: "I am the wife of plaintiff; was his wife at the time he moved into and took possession of the Woodworth property. Am acquainted with Mrs. Woodworth, one of the defendants in this action; have known her for eight or nine years at Moscow. She was living either at Wallace or Wardner at the time we took possession of the property. I knew of her coming back to Moscow two years ago—the spring of 1902. I was down at the hospital one afternoon and met Mr. Woodworth in the hall; he was going downstairs and he said, 'Lillie is upstairs; you had better go upstairs and see her.' Miss Baker was with me at the time. We went upstairs; Mrs. Woodworth was in the parlor and we sat down and talked; in our conversation she asked me how I liked our new home. I said 'real well'; that it was fine and such a pretty location and remarked that it was rather large. She said that was the objection she always had to the place. That was the substance of the conversation. I had another conversation with her, I imagine in June, sometime in 1902; I know it was quite warm. She and her mother called at the house one afternoon. They came in, sat down and talked to me; we had the house painted at the time. She remarked how pretty the house looked since it was painted. She says: 'It is just the color we intended to have it painted if we hadn't sold the place'; she says, 'You have the sitting-room painted too; it is very pretty.'"

Leeta D. Baker testified she had lived in Moscow about sixteen years; knew all the parties to the case and has known Mrs. Woodworth ever since she has lived in Moscow; heard the two conversations related by Mrs. Grice and practically related them in the same language.

Mrs. A. J. McDonald testifies to a conversation with Mrs. Woodworth in March, 1903. She says, "She asked Mrs. Woodworth if they weren't sorry that they had sold their home," and she said, "I guess we are." I said, "Why did you sell?" She said that Mr. Woodworth said they were going away and they would never come back to Moscow again, and they thought they might just as well sell while they had a chance. If Mrs. Woodworth desired to deal fairly with the Grices when she returned

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from Moscow, and found them in possession of her property, upon which she had filed a homestead declaration (if she did not know they were occupying the property under a claim of purchase prior to that time), she should have then said to them, "You are improving property upon which I have filed my homestead declaration; I have never consented to the sale of it and still desire to claim it as my home." This would have been good faith and reasonable diligence. Equity does not permit her to remain silent as to her claims and by her conversation encourage appellants to continue their payments and improvements on the property, then when they demand a deed answer by saying, "You can take a judgment against my husband for the amount you have paid on the purchase price and for the improvements made, less the reasonable rental during the time you have occupied the premises, but the property has increased in value and I am informed I can hold it under my homestead declaration; you may enforce your judgment against my husband if you can, but I will hold the property, which has about doubled in valuation." Courts of equity should not, and will not, encourage such transactions as are shown to exist in this case, and exempt them from compliance with the contract.

After carefully reconsidering this case, we are still of the view that the opinion heretofore filed correctly states the law of this case.

Sullivan, J., concurs.

AILSHIE, J., Dissenting.—The application of the doctrine adopted in this case to the facts it discloses, works an effectual rape of the statute in the name of that facile and beguiling progeny of equity called estoppel. I shall not enter upon any discussion as to whether or not the homestead of a married woman may be alienated or transferred in any other manner than that pointed out by statute. I am convinced, however, that if the doctrine of estoppel adopted by my brothers is applicable to a married woman and not forbidden by express statute, that, notwithstanding such a rule, the facts of this case are entirely barren of the elements of estoppel. In 16 Cyclopaedia, 726, Professor Bigelow defines the essential elements of

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estoppel *in pais* as follows: "In order to constitute an equitable estoppel there must exist a false representation or concealment of material facts; it must have been made with knowledge, actual or constructive, of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted upon; and the party to whom it was made must have relied on or acted upon it to his prejudice." Applying this test to the facts disclosed in the record, not a single element of estoppel as against Mrs. Woodworth can be gleaned from this case. All the acts, declarations and conduct of the wife in this case which are held to constitute an estoppel are narrated in the opinions of my associates, and it is therefore unnecessary for me to repeat them here. The acts and declarations of the wife in this case by which she is estopped to set up the plea of her homestead right were made to third parties, and that in the course of casual conversation which took place long after the purchaser, Grice, had paid the entire purchase price with the exception of a very trivial sum. And, indeed, there is no evidence in the record anywhere showing or tending to show, that the substance of these conversations and declarations, or any part thereof, was ever at any time communicated to Grice prior to the commencement of this action. It is not even shown when the wife came into knowledge of the fact that her husband had sold or contracted to sell this homestead, and so far as the record is concerned, that information may have been gathered by her long after her husband had received the entire purchase price, with the exception of \$25 unpaid at the time the action was commenced. It is said by the chief justice in his opinion that "if Mrs. Woodworth desired to deal fairly with the Grices when she returned to Moscow and found them in possession of her property. . . . she should have said to them, 'You are improving property upon which I have filed my homestead declaration. I have never consented to the sale of it and still desire to claim it as my home.' " One would infer from this statement that Grice had no information as to the filing of the homestead; but that would be a wrong impression. As a matter of fact, the homestead declaration was

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of record long before Grice entered into the contract with Woodworth or took possession of the property, and he was chargeable with notice of such fact as well as with notice of the provisions of the statute to the effect that the wife cannot be divested of her homestead right except by an instrument in writing duly acknowledged by her. The laches and neglect shown in this case are to my mind entirely chargeable to appellant rather than to the respondent, Mrs. Woodworth. It is true, as said by counsel for respondent in their brief, "that a certain degree of negligence is a luxury that all mankind are licensed to enjoy and for which every man must make an allowance in his dealings with other men." This is said upon the theory, I presume, that all men—and women too—are human, and may not live up to all the moral obligations their neighbors may think the code imposes; but for every such dereliction a court of equity cannot interpose with an adequate and speedy remedy. It is difficult to understand upon what theory either the actions, declarations or conduct of this married woman are to be construed into an estoppel against her defending her homestead rights where the record contains not a word showing that the party who purchased from her husband parted with a single dollar or made the slightest improvement upon the property upon any statement, act or representation made by her.

In speaking of an estoppel by actions and conduct, Justice Field, in *Henshaw v. Vissell*, 18 Wall. 271, 21 L. ed. 841, says: "For its application there must be some intended deception in the conduct or gross declaration of the party to be estopped or such gross negligence on his part as to amount to constructive fraud." Such is not the case here. The wife is apparently estopped in this case because she did not, as soon as she learned of this sale by her husband, rush out upon the streets and to her neighbors and recount her troubles to everyone with whom she met; and, of course, necessarily berate the conduct of her husband and brand him as one who was obtaining money under false pretenses.

After reading the majority opinion in this case the *femes covert* of this commonwealth in order to hereafter avoid the plea of estoppel will find it necessary, where their speculative hus-

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bands have parted with the old homestead, without their consent, to then turn Xantippes and rail their grievances as well from the housetops and market places as from the forum. And, indeed, in order that they may not be estopped, they should, on their "days at home," apprise all their gentle callers that, while their impecunious spouses lured them away from the old homestead bound with cords of affection, that still they are as deeply attached to that declaration of homestead as they were on the day when a considerate husband first suggested its execution. Or when she returns the call made by the "innocent purchaser's" wife, she might save herself from the bar of estoppel by reciting to that good dame how their husbands both were ignorant of the statute as well as unmindful of her individual property rights and learned in the arts of fraud. Or when the "*innocent purchaser*," ignorant of the statute, calls to pay her avaricious husband his monthly installment, she might eject him from the premises and deliver him a personal discourse, and thereby in a modest but Portian way save herself from this oft salutary, ever convenient, but sometimes dangerous, plea of estoppel.

The majority have told the good wives of this state that they must talk or be estopped—I am chagrined to hear it. It is enough if they keep still; indeed, the law hath required no more, and, moreover, equity taketh no delight in a parade of grievances and multiplicity of troubles where peace and quietude might reign. I am persuaded that it hath never before been written that our good wives should be estopped by the courtesies and pleasantries they exchange when "making calls" or at the "tea party."

I think the judgment should be affirmed.

Opinion of the Court—Stockslager, J.

(December 31, 1904.)

SHIELDS v. JOHNSON.

[79 Pac. 391.]

EQUITY PLEADING—JURY TRIAL MAY BE DENIED.

1. Where an action is brought in the district court by the party actually in possession of the property in controversy, for the purpose of quieting title to his leasehold estate, under the provisions of section 4538, Revised Statutes, it is a suit in equity, and neither party, as a matter of right, is entitled to a jury.

(Syllabus by the court.)

APPEAL from District Court of Latah County. Honorable Edgar C. Steele, Judge.

Action to enjoin defendants from entering the premises of plaintiff to commit waste. Judgment for plaintiff from which defendant appeals. Judgment affirmed.

The facts are fully stated in the opinion.

Stewart S. Denning and George G. Pickett, for Appellants. All authorities cited by them are cited in the opinion.

Forney & Moore, for Respondent, cite no authorities not cited in the opinion.

STOCKSLAGER, J.—The complaint in this action alleged that the defendants Johnson were and are husband and wife, and on the tenth day of October, 1900, were the owners of certain real estate in Latah county; that on that date said Johnsons, as parties of the first part, and plaintiff herein as party of the second part, for a valuable consideration therein expressed, entered into a contract or agreement, by the terms of which it is shown that plaintiff leased said real estate for a term expiring on the first day of December, 1904, with the privilege, at the option of the party of the second part, for a two years' extension, at the price hereinafter mentioned. It is shown by the lease that the parties of the first part are to furnish all the material necessary to keep the fences in good repair on the said

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property, and the party of the second part to furnish necessary labor to put such material in use. It is also shown by the terms of this lease or contract that the party of the second part had an option to buy all of said land at the time of any rental payment at the price of \$4,500, and in case party of the second part should elect to purchase, then his rental payment at that time should be part of the \$4,500. It was provided that the rental for the first four years should be \$250 per annum, payable not later than the first day of November of each year, and before the crop is removed from said land, if before that date, and in case the party of the second part shall continue the lease for the additional two years, then the rental should be \$300 per annum. There is also a provision in the lease that provides, if default shall be made in the payment of said rent or any portion thereof, when due, and for thirty days thereafter, the said lessors, their agents, etc., may re-enter and take possession, and at their option terminate the lease.

Plaintiff alleges that he entered into the possession of said premises after the execution of the lease and has faithfully kept and performed all of its terms and conditions; that the defendants, and each of them, claim an estate and interest in and to said premises, or some part or portion thereof, adverse to the intent of plaintiff which said claim or estate or interest of defendants, or either of them, is to plaintiff unknown. That such claim of defendants, or either of them, is without right, title or interest, paramount to plaintiff's right therein and plaintiff's right or possession thereof.

Plaintiff, for a further cause of action against defendants, alleges that about March, 1904, the defendants conspired together to wrong, cheat and defraud plaintiff, and to oust and eject plaintiff from possession of said premises, and in pursuance of said conspiracy upon the part of defendants and in furtherance thereof, and for the purpose and with the unlawful and wrongful intent to wrong, cheat and defraud plaintiff, and to oust and eject him from the possession of said premises, the said defendant, Frank Frazier, at various and divers times during said month of March, 1904, in the absence of the plaintiff from said premises, and without plaintiff's knowledge or con-

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sent, and against his will, has entered upon said premises, and has committed waste thereof to plaintiff's damage in the sum of \$500, with intent upon the part of said defendants, and each of them, to wrongfully and unlawfully cheat and defraud plaintiff.

The answer admits that plaintiff took possession of the premises as alleged in his complaint, but denies that he has done or performed faithfully or otherwise the conditions of his contract, or that plaintiff is entitled to the quiet and peaceable possession of the premises up to or until the first day of December, 1904. Admits that the defendants, and each of them, claim "an estate and interest in and to said premises and to every part and portion thereof adverse to the interests of the plaintiff's right of possession thereof; but denies that said claim, estate or interest of the defendants, or either of them, is or was at any of the times in plaintiff's complaint mentioned, to the plaintiff unknown, but defendants allege the fact to be that during all of the times in plaintiff's complaint mentioned, the defendants, Frank M. Johnson and Emma A. Johnson, were the owners in fee, in the possession of and entitled to the possession of the land and premises, in paragraph 1 of plaintiff's complaint specifically described—all of which was at all times in said complaint mentioned well known to the plaintiff herein; denies that the claims of the said defendants, or either of them, is without right. For answer to the second cause of action, denies that about March, 1904, or at any other time, or at all, defendants, or either of them, conspired together or otherwise to cheat and defraud plaintiff, or that the defendant, Frank Frazier, at various and divers times since March, 1904, in the absence of said plaintiff from said premises, or without plaintiff's knowledge or consent, has or did enter the premises or committed waste. . . .

"Defendants, for a further and separate answer and defense, allege the contract set out in the complaint, and then allege that during the year 1903 plaintiff herein refused and neglected to pay the rent for the year 1903; that after said rent became due, defendants, Frank M. Johnson and Emma A. Johnson, his wife, commenced an action in the district court of the second judicial

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district of Idaho, in and for Latah county, said action being brought for the recovery of the rents due under the terms of the said lease, and in said action defendants elected to and so alleged that they 'optioned to' and did thereby terminate said lease and all the rights of the lessee thereunder on account of the said lessee therein, the plaintiff herein, failing to pay said rent when due according to the terms and conditions of said lease."

That after the trial of said action in said court the judge of said court made and entered a decree as follows (we only note the portion of this decree that has a bearing on this case) :

"Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged and decreed that the plaintiff, Frank M. Johnson and Emma A. Johnson, his wife, do have and recover of and from said defendant, M. J. Shields, the sum of \$250 as rents due and owing at the time of the commencement of this action from defendant to plaintiff herein, for rent due under the terms of the lease in controversy herein for the year 1903, and in evidence herein, together with interest on said sum at the rate of seven (7) per cent per annum from December 1, 1903, and costs.

"It is further ordered, adjudged and decreed that defendants take nothing in this separate answer and equitable defense and cross-complaint."

They next allege that by virtue of said decree awarding them \$250 for rent unpaid for the year 1903, they had a right to and did terminate said lease and all of the rights of said M. J. Shields therein. That thereafter, and on the filing of said decree, defendants Johnson quietly and peaceably, lawfully and without hindrance of any kind, entered into and took possession of said premises as they had a right to do under the terms of said lease, and ever since the filing of said decree have been, and are, in the lawful, quiet and peaceable possession of said lands and premises as in law and equity they are entitled to do. Then they allege that the plaintiff has no right, title or interest in said lands or premises, and has had no right, title or interest in or to said premises since the fourth day of February, 1904;

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nor is the plaintiff at this time the owner of, in the possession of, or entitled to the possession of any of the lands or premises.

On these pleadings this case was tried by the court without a jury. On the nineteenth day of July, 1904, the defendants moved the court to have the case set as a law action. This application was denied and defendants excepted, which they now assign as error. Thereafter the court filed its findings of fact and conclusions of law. The first finding of fact is that the plaintiff and defendants Johnson entered into the lease as alleged in the complaint, and set out the lease in full. The second is that upon the execution and delivery of the contract, plaintiff entered into the possession of the premises, and has done and performed all of the terms and conditions therein provided by him to be kept and performed, and has faithfully complied with all of its terms and is entitled to the quiet and peaceable possession of the premises mentioned and described in said contract during the time provided for by said lease, to wit, up to and until the 1st day of December, 1904. Third, that the defendants and each of them claim an estate and interest in said premises adverse to the plaintiff and plaintiff's interest therein under and by virtue of the lease hereinbefore described. Fourth, that such claim of defendants, and each of them, is without right, and the defendants have no right, title or interest whatever in said premises, or any part or portion thereof, paramount to plaintiff's interest and right of possession.

The first conclusion of law is that the plaintiff having done and performed all of the terms and conditions of said contract therein provided by him to be kept and performed, is entitled to the quiet and peaceable possession of the premises mentioned in the contract during the term provided for by said lease, to wit, up to and including the first day of December, 1904. The second conclusion is that plaintiff is entitled to a decree as prayed for in the complaint. Third, that plaintiff is entitled to his costs.

Judgment and decree entered in compliance with the foregoing findings and conclusions.

Counsel for appellants first urge that when the plaintiff rested his case the motion for nonsuit then filed and submitted should

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have been sustained. This motion was properly overruled. The next contention is that there was no question of an adverse estate entering into this case, nor any equities of any kind or nature whatever that would bring it under the provisions of section 4538, Revised Statutes, which reads as follows: "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

With the answer of defendants "admitting that defendants and each of them claim an estate and interest in and to said premises, and to every part and portion thereof adverse to the interest of the plaintiff in and to said premises and to plaintiff's right to possession thereof," we think brings this action clearly under the provisions of section 4538. It is urged by respondent, and not denied by appellants, that at the time of the trial the question of damages was waived by plaintiff with the consent of defendants, and all allegations in the complaint as to damages were eliminated therefrom, thus leaving the sole question for the court to determine as to who was entitled to the possession of the premises. This question the court found in favor of the plaintiff.

In *Johnson v. Hurst*, ante, p. 308, 77 Pac. 791, this court, speaking through Mr. Justice Ailshie, said: "In California it has been held that the action to quiet title under section 738 of the Code of Civil Procedure, and which is identical with our section 4538, embraces 'every interest or estate in land of which the law takes cognizance'"; citing "*Pierce v. Felter*, 53 Cal. 18; *Wilson v. Madison*, 55 Cal. 5; *Orr v. Stewart*, 67 Cal. 277, 7 Pac. 693; *Pennie v. Hildreth*, 81 Cal. 130, 22 Pac. 399; last two cases cited with approval in *Pioneer Land Co. v. Maddux*, 109 Cal. 640, 50 Am. St. Rep. 67, 42 Pac. 295. This court held to the same effect in *Fry v. Summers*, 4 Idaho, 424, 39 Pac. 1118. The plaintiff made a showing which entitled him to recover. The defendant was a naked trespasser, and established no right either at law or in equity. Entertaining the views of this case as herein expressed, we see no reason for ordering a new trial."

The same may be said of the case at bar. The plaintiff asked that the defendants be required to come into court and set up
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their claim, which they did by averring a title which they claimed was better and paramount to the claim of plaintiff. The question of damages was eliminated by consent, and the court settled the issue in favor of the plaintiff.

It is next insisted by learned counsel for appellants that they were entitled to a trial by jury. There is no merit in this position. It is well said in respondent's brief: "Mr. Shields being in possession of the premises and the defendants claiming an estate and interest in the premises adverse to the plaintiff, no court other than a court of equity could offer the plaintiff adequate and complete remedy." (See *Root v. Railroad Co.*, 105 U. S. 189, 26 L. ed. 975; *Hipp v. Babin*, 19 How. (U. S.) 271, 15 L. ed. 633. For a full discussion of this question, see *Angus v. Craven*, 132 Cal. 691, 64 Pac. 1092.)

We have carefully reviewed the California cases cited by defendants, to wit: *Gillespie v. Gouly*, 120 Cal. 515, 52 Pac. 816; *Donohue v. Meister*, 88 Cal. 121, 22 Am. St. Rep. 283, 25 Pac. 1096; *Newman v. Duane*, 89 Cal. 597, 27 Pac. 66; *Hughes v. Dunlap*, 91 Cal. 385, 27 Pac. 642; *Taylor v. Ford*, 92 Cal. 419, 28 Pac. 441; *Landregan v. Peppin*, 94 Cal. 465, 29 Pac. 771; *Haggin v. Kelley*, 136 Cal. 481, 69 Pac. 140—and do not think they apply to the case at bar.

The question as to the right of trial by a jury in equity cases was before this court in *Christensen v. Hollingsworth*, 6 Idaho, 87, 96 Am. St. Rep. 256, 53 Pac. 211. The opinion is by Chief Justice Sullivan and concurred in by his associates, Justices Huston and Quarles. The syllabus says: "The guaranty found in section 7, article 1 of the constitution, that the right of trial by jury should remain inviolate, was not intended to extend the right of trial by jury, but simply to secure that right as it existed at the date of the adoption of the constitution. Such provision does not guarantee a jury trial in equitable actions." A large number of cases are cited in this opinion supporting this position.

We find no error in the record, and the judgment is affirmed, with costs to respondent.

Sullivan, C. J., and Ailshie, J., concur.

Argument for Appellant.

(December 31, 1904.)

KENDRICK STATE BANK v. NORTHERN PACIFIC
RAILWAY COMPANY.

[79 Pac. 457.]

APPEAL—REVIEW—CONFLICTING EVIDENCE.

1. Where there is a substantial conflict in the oral evidence, the verdict of the jury and the judgment of the trial court will not be reversed.

(Syllabus by the court.)

APPEAL from the District Court of Latah County. Honorable Edgar C. Steele, Judge.

Action in claim and delivery. Judgment for the plaintiff. Affirmed.

The facts are stated in the opinion.

I. N. Smith, for Appellant.

Plaintiff's Exhibit "A"—"Received of H. A. Russell, 600 bx. App. in store, dollars, O. M. Cleveland"—is not a warehouse receipt. Porter's name is not attached—it is not in the form prescribed by Session Laws of Idaho of 1899, pages 7, 8, nor is it in any manner such a document as would be admissible on a criminal prosecution against Porter under those sections. The words therein, "in store," add nothing to its significance, as it was issued without authority, and Russell knew it at the time he got it. The usual storage receipt that was required by the statutes was not given at the time they were delivered there, for the reason, as Mr. Russell was informed, that the party having charge of the warehouse had no authority to issue what are called warehouse receipts, etc. Both Porter and Cleveland say Cleveland had no authority to issue warehouse receipts. (*People's Bank v. Gayley*, 92 Pa. St. 518; *Cathcart v. Snow*, 64 Iowa, 584, 21 N. W. 94 (construing "stored"); *Sinsheimer v. Whitely*, 111 Cal. 378, 52 Am. St. Rep. 192, 43 Pac. 1109; *Geilfuss v. Corrigan*, 95 Wis. 651, 60 Am. St. Rep. 147, 70 N. W. 306, 37 L. R. A. 166; *State v. Bryant*, 63 Md. 66; *Union Savings Assn.*

v. St. Louis Grain Exchange Co., 81 Mo. 341.) Plaintiff came into court to procure provisional remedies of claim and delivery, on an affidavit which was not true. This was iniquitous conduct relating directly to the suit, and involving the matters in controversy. That such action prevents plaintiff from obtaining any relief and stops the granting of any relief to him is settled in Revised Statutes of Idaho, 4020; Pomeroy's Equity Jurisprudence, secs. 397, 404. The next question to consider is, the title of Kendrick State Bank to the property in controversy. The title of the bank rested on the "receipt"—heretofore shown to be void. It therefore had nothing, and the motion for nonsuit was proper. The bank could take no greater rights under the "receipt" than Russell had. Russell had no receipt—if he obtained it as he said, it was void, as having been obtained surreptitiously from an unauthorized agent; if he obtained it as Cleveland said, it was void, as being a mere memorandum and not a receipt of any nature. (*Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 63 Am. St. Rep. 302, 49 N. E. 592, 39 L. R. A. 725; *Gueilfuss v. Corrigan*, 95 Wis. 65, 60 Am. St. Rep. 143, 70 N. W. 506, 37 L. R. A. 166.)

Forney & Moore, George W. Coutts and G. W. Suppiger, for Respondent bank, cite no authorities.

John M. Bunn and Ellis T. White, for Northern Pacific Railway Company, Respondent, cite no authorities.

SULLIVAN, C. J.—This action is one in claim and delivery and was brought in the probate court of Latah county, the Kendrick State Bank being the plaintiff and the Northern Pacific Railway Company the defendant, to recover the possession of four hundred and thirty-seven boxes of apples of the alleged value of \$437. On application to the court, L. A. Porter, the appellant here, was permitted to intervene.

The pleadings are somewhat lengthy, and it is sufficient to say that the real question in issue was as to the ownership of said four hundred and thirty-seven boxes of apples. The cause was tried in the probate court and the judgment was in favor of the bank. The cause was appealed to the district court, and tried there by the court with a jury, and the verdict and judg-

ment was in favor of the bank against the intervener appellant. The appellant by his plea in intervention claimed to be the owner of the fruit in controversy, and that he shipped the same by the Northern Pacific railroad from himself at Kendrick, Idaho, to himself at St. Paul, Minnesota, on the eleventh day of November, 1904. He alleges that he shipped four hundred and ninety-one boxes of fruit, more or less, at the value of \$500; that said fruit was en route, and that he had a bill of lading issued by said railroad company, and while the fruit was so en route, and without the exercise of *vis major*, or any event giving cause therefor, the respondent bank and the railroad company, wrongfully and without right, set out said car of fruit and unlawfully stopped the same and removed four hundred and twenty boxes thereof from the car, and converted the residue to their own use; that the bank instituted this action and omitted to join the intervener in its affidavit, and that the bank falsely stated in its affidavit of claim and delivery that the cause of detention of said fruit was unknown; whereas it knew the cause thereof and that the bond on claim and delivery was void as being justified to before the attorney for plaintiff. To that complaint in intervention the railroad company filed an answer denying the material allegations. The bank answered the complaint in intervention, denying the material allegations thereof and averred that it was the owner of said fruit. This appeal is from the judgment and order denying a new trial. It will be seen, therefore, that this action is one in claim and delivery with an intervener setting up rights to the property.

The first question to be determined is the ownership of the apples in controversy. If the appellant was the owner of them, then the judgment must be reversed, but if he is not, the judgment must be affirmed.

It appears from the evidence that a settlement was made, or attempted, between Porter and one Russell on the fifth day of November, and Russell testified as follows: "I had a conversation with him [Porter] on that day prior to the time the train left, about the apples in controversy; that was a proposition to sell to him. I said I would take eighty cents a box for them, and he said he would give me seventy-five cents, and I did not

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sell them to him for seventy-five cents." He also testified that after Mr. Porter had left Kendrick on the 5th of November, that he received the following receipt from O. M. Cleveland, who had charge of the warehouse operated by Porter in which the apples were stored, to wit: "Received of H. A. Russell, 600 bx. app. in store. Dollars. O. M. Cleveland." Russell testified that on the evening of the 5th, after receiving that receipt, he sold the apples to the bank, and that he acted for the bank and ordered the apples loaded for shipment; that he hired a man to expedite the loading of the same; that later he discovered that some pears had been placed in the car, and he thereupon notified the agent of the railroad company not to ship the apples, and he was informed by that agent that the car had already been billed out. Thereupon he informed said Cleveland that he had sold the apples to the respondent bank and the agent thereupon tore up the bill of lading that he had issued to appellant. On that point Mr. Porter testified as follows: "A bill of lading was issued to me for that car of apples in controversy prior to the 11th of November, 1901, and the agent tore it up. He tore it up after Russell had told him the apples belonged to the bank."

Mr. Cleveland, on behalf of the appellant, testified as follows (on being shown said receipt): "I recollect the circumstances on which I signed this; this is my signature and I call this a memorandum receipt; I signed this about half-past 11 or 12 o'clock, November 5, 1901. I then gave it to Mr. Russell as soon as I signed it. Mr. Russell and Mr. Porter were doing business until pretty near 11 o'clock the same morning. Both Mr. Russell and Mr. Porter went down town, and Mr. Russell came back, and this was just shortly before he went to dinner. I issued this receipt because Russell came and asked for a statement of what he had in; he wanted to know if I would give him something to show for the apples he had in. I says: 'I will give you something to show.' . . . The conversation between him [Russell] and Mr. Porter I heard lasted from about 9 to 11, and this business transaction between them was at that time; I heard the conversation they had about the apples; stating it the best I can, I say, the first I heard, I

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heard Porter say: 'I will give you seventy-five cents a box for the apples.' I then went over and listened to the conversation all the way through, and Mr. Russell says: 'I think I should get eighty cents. I want the cash; I want you to buy them outright now.' Porter says: 'No, Russell, I can't do it; seventy-five cents is all they are worth,' and they went on talking about it a few minutes the same way, and at last Porter says: 'I will give you a guaranty of seventy-five cents a box, and part of anything I get over eighty-five cents. I want ten cents a box for commission for handling the apples.' "

The witness further testified shortly after 10 o'clock on that day that he met Russell, and Russell said: "Cleveland, I think I will accept that offer of Porter—that is, he says, seventy-five cents a box, and part of all he gets, over eighty cents a box; and I am to get a part of everything over eighty-five cents." The witness further testified that Russell instructed him to get the apples out just as soon as he could and that he started to repack and load the apples on November 5th, and completed the loading about 7 o'clock P. M., November 9th. Mr. Porter testified as follows: "I say I bought these apples from him [Russell] on November 5th, and further that Russell wanted eighty to ninety cents per box for the apples then. So on the 5th I finally agreed to give him seventy-five cents a box for everything but the Jeffries, absolute, and then I told him all I could realize above eighty-five cents I would divide with him, divide between us and he said he would let me know later. That related to these apples in controversy."

The appellant, Porter, further testified as follows: "My day-book shows I gave Russell credit on the 11th (November) for those apples. I presume this entry was made after my conversation with Jacobs and Suppiger."

It appears from the record that the appellant and said Jacobs, who was president of the bank, and Suppiger, who was its attorney had a conversation with the appellant in regard to the settlement of this matter, and it appears from the above testimony that it was after such conversation was had that Porter gave Russell credit for the apples.

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The witness Russell was recalled and testified, among other things, as follows: "The conversation I had with Porter on November 5th about selling these apples in controversy was, I told him under the circumstances I was willing to take eighty cents a box for these apples, in order to square up my account with the bank, and he offered me seventy-five cents for the apples; I didn't accept his proposition; when Cleveland gave me the receipt (being the one above set forth), this warehouse receipt, I called for the receipt in the evening, after Mr. Porter had gone, and we failed to make a settlement and I told him [Cleveland] I wanted it for the purpose of turning it over to the bank. I had sold the apples and wanted to cover my overdrafts. I asked him for the receipt and he gave it to me. I didn't have any conversation with Cleveland about noon the 5th of November, 1901, in which I told him I had accepted Porter's proposition of seventy-five cents a box for the apples. Mr. Porter being there at the time, I was in consultation with Porter himself, and I went to dinner with him at noon. I never at any time told Mr. Cleveland that I had accepted Porter's offer of seventy-five cents a box for the apples."

The above quotations from the evidence are sufficient to show that there was a substantial conflict therein as to the ownership of said apples. That being true, this court is not disposed to disturb the judgment of the trial court on the ground that the evidence is not sufficient to support it.

It appears from the record that prior to November 11th, the railroad company issued a bill of lading for said car of apples to the appellant, Porter, and thereafter destroyed said bill when Russell informed the agent that the apples belonged to the bank, and it appears that on the eleventh day of November, at the request of Porter, and without the consent of the bank, the railroad company issued a second bill of lading and proceeded to remove the car of apples from the state. It also appears that Porter told Jacobs, the president of the bank, and also the bank's attorney, on the morning of the 11th of November, that he would not ship the apples, and, under that state of facts, the affiant might truthfully say in his affidavit in claim

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and delivery that he did not know the cause of detention of the apples by defendant, the railroad company.

It is contended that the receipt above set forth signed by Cleveland is not a warehouse receipt; that Porter's name is not attached to it and that it is not in the form prescribed by Session Laws of 1899, pages 7 and 8. That contention is admitted by counsel for respondent. But, however, it is a receipt showing that Porter had stored, for Russell, six hundred boxes of apples, and, as Porter had not purchased the apples from Russell, all the claim that he would have against the apples would be for warehouse or storage fees, and such fees as he would be entitled to for handling the fruit, and the record shows that he was tendered by the bank the amount due him for that service, and we think, from the entire record, that that was all the interest that Porter had in the apples. The bank having purchased the apples from Porter, it was entitled to the possession of them upon tendering or paying to Porter the amount of such charges.

Having arrived at the conclusion that the bank became the owner of the apples by purchase from Russell, it is unnecessary for us to pass upon the many other errors assigned in regard to certain instructions and the admission and rejection of testimony.

The judgment must be affirmed, and it is so ordered, with costs in favor of the respondent.

Stockslager, J., and Ailshie, J., concur.

Points decided.

(December 31, 1904.)

**HUMBIRD LUMBER COMPANY v. KOOTENAI
COUNTY.**

[79 Pac. 396.]

**APPEAL FROM ORDER OF COMMISSIONERS—TRANSMISSION OF PAPERS BY
CLERK TO JUDGE—SETTLEMENT OF STATEMENT ON APPEAL—TAX
LEVY—SPECIAL ROAD TAX—DUPLICATE TAXATION.**

1. The provisions of section 1778, Revised Statutes, as amended by act of February 14, 1899 (Sess. Laws 1899, 249), requiring the clerk to transmit the papers on appeal from an order of the board of commissioners to the district judge within five days after the service of the notice of appeal is not jurisdictional, and a failure to do so does not deprive the appellant of the benefits of his appeal.

2. It is the privilege and duty of a trial judge to require a statement on motion for a new trial or on appeal to be corrected until it conforms to the truth as to all matters it purports to contain, whether any amendments have been offered or not, and a statement should not be settled until it is so corrected if errors exist.

3. Act of March 5, 1901 (Sess. Laws 1901, 78), "providing for a special property road tax, and defining the duties of officers in the levy and collection thereof," is not in conflict with the last clause of section 5, article 7 of the constitution, which provides that "duplicate taxation of property for the same purpose during the same year is hereby prohibited," where all the taxable property of the county is required to respond to such levy, notwithstanding a general tax levy is made for the same year for road purposes.

(Syllabus by the court.)

APPEAL from District Court in and for Kootenai County.
Honorable Ralph T. Morgan, Judge.

The board of commissioners of Kootenai county made an order on the thirtieth day of January, 1903, levying a special property road tax on all the taxable property within Kootenai county, and from the order so made, the Humbird Lumber Company, a corporation, owning property within said county, appealed to the district court. The order of the board of commissioners was affirmed by the district court, and the appellant

Argument for Appellant.

thereupon appealed to this court. Judgment and order affirmed.

Charles L. Heitman and M. J. Gordon, for Appellant.

The assignments present but a single question, and that goes to the constitutionality of the act of the legislature of the state of Idaho under which the levy made by the respondents and complained of by the appellant was made. That act was approved on March 5, 1901, and is entitled "An act providing for a special property road tax and defining the duties of officers in the levy and collection thereof." It will be noticed that it was admitted at the trial that in addition to the levy embraced in the order appealed from, the board of commissioners on the 14th of September, 1903, levied a tax of thirty cents on the hundred dollars' valuation on all taxable property in said county, as and for the general road fund; and that in making this last-mentioned levy, the board proceeded upon the authority conferred by section 1168 of the Political Code of 1901. It is the contention of the appellant that as a result of these separate levies, the property owned by them, situated within the county of Kootenai, has been twice called upon within the same year to directly contribute to the same burden; and they invoke that clause of section five (5), article seven (7) of the constitution of Idaho, which provides, "That duplicate taxation of property for the same purpose during the same year is prohibited." The inhibition contained in this constitutional clause extends to all property, and the only policy which is sanctioned is that for a given purpose, taxable property must respond once and only once during a given year. It does not deal or profess to deal with "duplicate taxation" as meant and discussed by Cooley and the other writers. It does not deal or profess to deal with the subject of "equality and uniformity" as discussed in the text-books. It is neither ambiguous nor uncertain. Reasoning and argument cannot make the proposition clearer. Here section 1168, *supra*, provides for an "annual tax" on property by valuation for "road purposes," and section 1169 provides for a "special" tax on property by valuation as and for a "road tax." (*City of Genessee v. Latah County*, 4 Idaho, 141, 36 Pac. 701.)

Argument for Respondents.

Thomas H. Wilson, County Attorney, and C. W. Beale, for Respondents.

Fortified by the statute on appeals from orders of the board of county commissioners (section 1778, as amended by the act of February 14, 1899, Sess. Laws 1899, p. 249), and the decision of this court in *Ulyne v. Bingham County*, 7 Idaho, 75, 60 Pac. 76, our contention is that the failure on the part of the appellant to cause to be transmitted to the district judge a copy of the notice of appeal, and the order and proceedings appealed from within five days, or within any time or at all, absolutely prevented the lower court or judge from entertaining any jurisdiction whatever, and that, under said decision, the judge of the lower court should have entered up a judgment dismissing said pretended appeal. There was absolutely no authority for the filing of the complaint and answer set forth in the bill of exceptions. The only record upon which the court could hear the appeal was the record made before the board of county commissioners. Counsel can neither stipulate away the rights of the people nor inject into a special proceeding a system of pleading unauthorized by the statute. (*Board of Commissioners v. Denver Union Water Co.*, 32 Colo. 382, 76 Pac. 1060, at par. 4, p. 1062.) It is possibly true that, prior to the adoption of our constitutions, the expressions in other constitutions that "all taxes shall be equal and uniform," "according to a valuation," or the like, were by the majority of the decisions held to forbid duplicate or double taxation, while in other jurisdictions, the same construction was not always placed upon such provisions. (27 Am. & Eng. Ency. of Law, 2d ed., pp. 607, 608.) The constitutional provision contained in said section 5, article 7, with reference to uniform and double taxation, has reference only to taxation pure and simple, according to the commonly accepted meaning of that term, for the purpose of revenue only and not for the purpose of a special school or road tax. (*State v. Dougherty*, 3 Idaho, 384, 29 Pac. 855; *State v. Union Cent. Life Ins. Co.*, 8 Idaho, 240, 67 Pac. 647; 25 Am. & Eng. Ency. of Law, 2d ed., p. 1174.) Taxation for special purposes is not prohibited although the same property is also taxed for general purposes. (*Hilgenberg v. Wilson*, 55

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Ind. 210; *Drysdale v. Pradat*, 45 Miss. 445; *City of St. Joseph etc. R. Co. v. Saville*, 39 Mo. 477.) A tax upon a county for the support of the insane asylum is not duplicate taxation, although a general tax is levied for the support of such institution. (*Bon Homme County v. Berndt*, 15 S. Dak. 494, 90 N. W. 147; *State v. County of Douglas*, 18 Neb. 601, 26 N. W. 378.) Although a special assessment has been levied on land to pay part of the cost of a local improvement, it is still subject to a general tax to pay the balance. (*French v. Barber Asphalt Paving Co.*, 181 U. S. 324-343, 21 Sup. Ct. Rep. 625, 45 L. ed. 879; *State v. Newark*, 48 N. J. L. 101, 2 Atl. 627; *State v. Newark*, 49 N. J. L. 239, 12 Atl. 770.) Assuming, for the sake of argument, that all moneys collected under the general road tax were to be expended in the same road district where the moneys collected under the special road tax are to be expended, how, then, could it be contended that this was duplicate taxation, since it affects all property alike? Tested by the rule laid down in the New Jersey and South Dakota cases, what possible objection can there be to the levying of a special assessment for the improvement, construction and repair of roads where the general levy was insufficient to meet such requirements. If the general assessment and the special assessment were for absolutely the same purposes, they would not constitute duplicate taxation. The very most that could be said of them would be that one or the other was an additional assessment to pay for the necessary construction or improvement where either the general assessment or the special assessment had been insufficient to pay such expenses. In the case of *Bramwell v. Guheen*, 3 Idaho, 347, 29 Pac. 110, this court recognized the validity of the statute providing for the levy of a special school tax. (*Salisbury v. Lane*, 7 Idaho, 370, 63 Pac. 383.) A statute will not be held unconstitutional unless its conflict with the constitution is shown beyond all reasonable doubt. (*Bon Homme County v. Berndt*, 15 S. Dak. 494, 90 N. W. 147; *Cook v. Port of Portland*, 20 Or. 580, 27 Pac. 263, 13 L. R. A. 533; *Cooley on Taxation*, 3d ed., p. 394.)

Opinion of the Court—Ailshie, J.

AILSHIE, J.—On the thirtieth day of January, 1903, the board of commissioners of Kootenai county, then being in regular session, made and entered of record the following order:

“In the Matter of Levying a Special Road Tax for the Year 1903.

“The levy of a special road tax being at this time under discussion, in the judgment of the board the regular tax levy for roads is insufficient to meet the requirements required on the roads in Kootenai county, the board by a unanimous vote, passed the following resolution:

“Be it resolved, that a special property tax of eight (8) mills on the dollar be, and the same is hereby levied against all of the taxable property in the several road districts of Kootenai county, Idaho, in accordance with the provisions of an act of the legislature of the state of Idaho, entitled, ‘An act providing for a special property road tax, and defining the duties of officers in the levy and collection thereof.’

“And it is further resolved: That where work is performed in working out road tax hereby levied, \$2 per day shall be allowed for each man, and \$2 per day for each team, as full compensation for each day's labor performed upon the road.”

At the time of making the foregoing order the appellant, the Humbird Lumber Company, a corporation, was the owner of large bodies of timber land situated within Kootenai county, and subject to the tax levy as set out in said order, and being dissatisfied with the action of the board and desiring to test the validity of the order and the constitutionality of the act of the legislature authorizing such an order and levy, appealed from the action of the board to the district court. After perfecting the appeal the appellant filed what was designated a complaint on appeal, and thereafter a stipulation was entered into between the respective counsel as to the facts in the case. The case was heard, and on the nineteenth day of January, 1904, the district court rendered and entered his judgment affirming the action and order of the board of commissioners, and holding the same valid and binding upon the appellant. From this order and judgment the appellant has appealed to this court.

Opinion of the Court—Ailshie, J.

It appears that the clerk did not transmit the papers on appeal to the district judge within five days after the filing thereof by appellant as required by section 1778, Revised Statutes, as amended by act of February 14, 1899 (Sess. Laws 1899, p. 249), and for that reason respondent contends that the district judge never acquired jurisdiction of the appeal, and that the same should have been dismissed. This question has been frequently raised on these appeals, and we think it proper to say here that such failure or neglect on the part of the clerk should not deprive the appellant of the benefits of his appeal. The appeal is perfected upon the service of notice (*Great Northern R. R. Co. v. Kootenai County*, ante, p. 379, 78 Pac. 1078), and the transmission of papers to the judge is a purely ministerial act to be performed by the clerk, no part of which duty rests upon the appellant any more than upon the respondent. The only purpose of transmitting the papers to the judge within so short a time is that he may direct a summary hearing at chambers if he thinks the appeal is one of sufficient importance that it requires immediate consideration and decision. The matter can as easily be brought to the attention of the judge by the respondent as by the appellant. We are cited to *Clyne v. Bingham County*, 7 Idaho, 75, 60 Pac. 76, in support of the position taken by respondent, but we do not think anything said in that case supports respondent's contention.

Some discussion is entered into in the respective briefs concerning the action of the trial judge in sending up an extensive additional certificate as to certain things occurring and others not occurring as set forth in the statement of the case. It seems that respondent filed and served certain amendments to the proposed statement, but not within the statutory time. Those amendments were therefore not incorporated in the statement, and after the settlement of the same, the judge made and filed his certificate setting forth that numerous matters contained in the statement were never presented to him, and other corrections that should have been made. We do not think the practice of settling statements, and after having done so, and possibly in the absence of the counsel for one or both sides, making and filing an independent certificate disputing state-

Opinion of the Court—Ailshie, J.

ments contained in the original statement or bill is commendable. It is the duty of a trial judge to see that any and all statements of the case signed by him conform to the facts, and if they contain any matter that is not true, it is his duty to eliminate the same from the statement or correct it until it does conform to the truth, whether any amendments have been offered or not. When a trial judge discovers that errors exist in the record he should call them to the attention of the attorney who presents the same, and if he does not correct them to conform to the facts, the statement should not be settled. It is true that counsel for respondent should carefully examine all statements served upon him, and see that they contain no false or incorrect statements, and that, on the other hand, they contain the whole truth. If after the settlement of a statement the trial judge should discover that the same contained some error or mistake, we think it is still proper to correct it, but we do not think such correction should be made without first giving notice to counsel on both sides. With these observations we pass to the consideration of the controlling legal proposition presented upon this appeal.

Section 5 of article 7 of the constitution provides that "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the taxes, and shall be levied and collected under general laws. . . . Provided further, that duplicate taxation of property for the same purpose during the same year is hereby prohibited." It will be observed that the tax levy complained of in this case was made in January, and is a special levy for road purposes only. The general tax levy for Kootenai county for the year 1903 was made on the fourteenth day of September, and, among other items, contained a levy of thirty cents on each hundred dollars' valuation upon all taxable property in the county for the general road fund. Now, appellant contends that since by the general tax levy it is taxed thirty cents on the one hundred dollars' valuation for road funds, and by the special levy made in January it is taxed eight (8) mills on the dollar for road purposes, that it is made the subject of duplicate taxation in violation of the provisions of section 5, article 7 of the constitution.

Opinion of the Court—Ailshie, J.

It is admitted that the appellant has not been singled out as an individual or particular subject of duplicate taxation, but, on the contrary, it appears that all taxable property within Kootenai county was subjected for the year 1903 to the same taxation as was the property of appellant. Under the statutes of this state all taxes collected under the general tax levy for road purposes are disposed of as follows: First twenty-five per cent of the taxes collected from property taxable within any given road district must be applied to the use of the roads in that particular district, and the remaining seventy-five per cent goes into a general fund for the use of the public highways anywhere within the county. (*City of Genessee v. Latah County*, 4 Idaho, 141, 36 Pac. 701; *Carson v. City of Genessee*, 9 Idaho, 244, 74 Pac. 862.) On the other hand, all labor performed or money collected by virtue of this special levy is employed upon the roads within the road district from which the same is collected. (Act March 5, 1901, Sess. Laws 1901, p. 78.) By the provisions of this act it appears to be optional with the board of commissioners as to whether or not they will make the order for a special property road tax; but if they do so, the entire tax levied under such order may be paid in labor upon the public roads. This is the only tax levy provided for by statute which may be paid in labor, and it would seem that the legislature in enacting such statute had in mind the great necessity for keeping up the roads and highways, and at the same time were considering the easiest way of imposing a part of this burden upon the taxpayers. They must have concluded that a large number of taxpayers could more easily, between the 1st of May and the 1st of July, perform a number of day's labor upon the roads and highways than pay the cash by way of taxes. It is certainly true that the board of commissioners, when making the general tax levy, take into consideration the amount of labor and money to be derived from the special property road tax before making a general levy for that purpose. It must be conceded that the tax derived both from this general levy and the special levy is all collected for ultimately the same purpose; namely, the improvement of roads and highways, and the manner and method of collection in case of delinquency is the same

Opinion of the Court—Stockslager, C. J., on Rehearing.

for both the general and special levy, and both are made at the same time. It does not seem to us, however, that this constitutes duplicate taxation within the meaning of section 5, article 7 of the constitution. The prohibition contained in that section against duplicate taxation was undoubtedly directed against the taxing of the same property twice during the same year for the same purpose, while other like and similar property is taxed only once during the same period for the same purpose, as, for example, if property should be taxed against the bailor and bailee or against the trustee and *cestui que trust*, mortgagor and mortgagee—such a taxation would be clearly duplicate, and it is in this sense that the *uniformity* clause found in many of the constitutions had been construed prior to the adoption of our constitution. (1 Cooley on Taxation, 3d ed., 394; 27 Am. & Eng. Ency. of Law, 2d ed., 607.)

This question as it arises under the peculiar language of the last clause of section 5 is not free from doubt in our minds, but as we view the matter, we are not prepared to hold that the act of March 5, 1901 (Sess. Laws 1901, 78), is unconstitutional, and that the levy made by the board of commissioners in pursuance of that statute constituted duplicate taxation.

The judgment of the trial court will be affirmed and the order of the board of commissioners will be held legal and valid. Costs awarded to respondent.

Sullivan, C. J., and Stockslager, J., concur.

ON REHEARING.

(January 30, 1905.)

STOCKSLAGER, C. J.—Counsel for petitioner insists that the opinion in this case renders meaningless the last clause of section 5, article 7 of the constitution, and that their claim for relief is based upon the language, to wit, "Provided, further, that duplicate taxation of property for the same purpose during the same year is hereby prohibited." It will be observed that the entire section 5, article 7 of the constitution was discussed and construed in the opinion of the court, and as said by Mr. Justice Ailshie, the language of the last clause of sec-

Points decided.

tion 5, article 7, is peculiar. We are not prepared to say that the legislative act of March 5, 1901, is unconstitutional. We find nothing in the petition for rehearing that changes our views as expressed in the opinion, and the petition is denied.

Ailshie, J., and Sullivan, J., concur.

(December 31, 1904.)

SMALL v. HARRINGTON.

[79 Pac. 461.]

RULE FOR ADMISSION OF EVIDENCE IN EQUITY CASES—NUISANCE IN NAVIGABLE STREAM MAY BE ABATED AT SUIT OF PRIVATE CITIZEN—ACQUITTAL ON CHARGE OF MAINTAINING NUISANCES NO BAR TO CIVIL ACTION—AMENDMENTS TO PLEADINGS DISCRETIONARY—NONSUIT NOT GRANTED WHEN—SUFFICIENCY OF EVIDENCE TO SUPPORT JUDGMENT.

1. In the trial of equity cases the court is not confined to the strict rules prescribed for the admission of evidence in law cases.

2. An action may be maintained by a private citizen to restrain the construction of a nuisance in the navigable streams of this state, under the provisions of section 3633, Revised Statutes.

3. The trial and acquittal of a party charged with the construction of a nuisance in a navigable stream of this state by a jury in justice's court is no bar to a civil action to restrain the completion of the alleged nuisance.

4. Amendments to pleadings at any stage of the proceedings are largely within the sound discretion of the trial court.

5. A motion for nonsuit should be denied unless the evidence wholly fails to establish a right of recovery.

6. In equity cases the appellate court will examine the evidence with a view to sustain the trial court in its findings and judgment, but will reverse the judgment if the evidence is insufficient to sustain it.

(Syllabus by the court.)

APPEAL from the District Court of Nez Perce County.
Honorable Edgar C. Steele, Judge.

Argument for Appellants.

Judgment for plaintiff from which and an order overruling a motion for a new trial, defendants appeal. Reversed.

The facts are fully stated in the opinion.

Eugene O'Neill and I. N. Smith, for Appellants.

The legislature of the state, in the absence of congressional action, has control of the navigable streams of the state. (*Woodman v. Kilbourne Mfg. Co.*, 1 Biss. 546; S. C., 30 Fed. Cas. No. 17,978, p. 510.) The legislature of this state having seen fit to authorize the erection of dams and booms in its creeks and rivers with passageways around sufficient and so arranged as to permit timber to pass around, through or over said dam without unreasonable delay or hindrance has legalized the obstruction complained of in this case, the evidence showing a free passage north of the alleged obstructions ample and sufficient at all stages of water that allows of the passage of rafts or logs in the channel west of the piers—north and northward of defendants' mill. (Idaho Rev. Stats., sec. 835; *Wilson v. Blackbird Creek M. Co.*, 2 Pet. 245, 7 L. ed. 412, decision by Marshall, C. J.; *Pound v. Tuck et al.*, 95 U. S. 459, 24 L. ed. 525; *McKelvey v. Chesapeake etc. Ry.*, 35 W. Va. 516, 14 S. E. 267.) The evidence shows no use made of the waters of Clearwater river either unauthorized, unreasonable or unnecessary. (*Dutton v. Strong*, 1 Black (U. S.), 1, 17 L. ed. 29, 32; *Brown v. Kentfield*, 50 Cal. 129; *Yates v. Milwaukee*, 77 U. S. 497, 19 L. ed. 986.) In the case at bar the defendants' log boom is at the lower end of the slough east of their mill. The navigation of the stream is exclusively, at this point, for timber, rafts and logs. The structures complained of reach the floatable waters of the slough leaving to the north a passageway that is wide, deep and safe whenever the space west, to the north and northwest of defendants' mill, will permit of the passage of the logs. This is a reasonable use of a part of the stream, authorized, and the alleged obstructions necessary appliances for using the stream. (*Stevens' Point Boom Co. v. Reilly*, 46 Wis. 237, 49 N. W. 978, 979; *Mississippi etc. Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206, 208; *Attorney General ex rel. Benjamin v. Manatee River Imp. Co.*, 42 Mich. 628, 4 N. W. 483,

Argument for Respondents.

486; *Attorney General v. Evart Booming Co.*, 34 Mich. 461, 475.) To entitle a private individual to maintain the action he must show special injury and must show that the obstruction was unreasonable. (Farnham on Waters and Water Rights, p. 430; *Attorney General v. Stevens*, 1 N. J. Eq. 369, 22 Am. Dec. 526; *Esson v. Wattier*, 25 Or. 7, 34 Pac. 756, 758.) What the state authorizes it cannot prosecute as a nuisance. (*Chope v. Detroit etc. Plank Road*, 37 Mich. 195, 198, 26 Am. Rep. 512; *Watts v. Norfolk etc. R. Co.*, 39 W. Va. 196, 45 Am. St. Rep. 894, 19 S. E. 521, 23 L. R. A. 674.) Reasonable use is the touchstone for determining the rights of the respective parties. The products of the forest would be of little value if the riparian proprietors have no right to raise the water by dams and erect mills for the manufacture of those products into lumber. (*Gaston v. Mace*, 33 W. Va. 14, 25 Am. St. Rep. 848, 10 S. E. 63, 64, 5 L. R. A. 392; *Lancey v. Clifford*, 54 Me. 487, 92 Am. Dec. 561; Farnham on Waters and Water Rights, 425; *Pratt v. Brown*, 106 Mich. 628, 64 N. W. 583.)

McFarland & McFarland, for Respondents.

Anything which is injurious to health or is indecent or offensive to the senses or an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, stream, canal, or basin or any public park, square, street or highway is a nuisance. (Idaho Rev. Stats., sec. 3620.) The nuisance complained of in this case is both public and private. (Idaho, Rev. Stats. secs. 3620-3622; *Yolo Co v. City of Sacramento*, 36 Cal. 193.) A private person may maintain an action for a public nuisance if it is specially injurious to himself, but not otherwise. (Idaho Rev. Stats., secs. 3633, 4529; *Redway v. Moore*, 3 Idaho, 312, 29 Pac. 104; *Dawson v. McMillan*, 34 Wash. 269, 75 Pac. 807; *Crescent Mill & Trans. Co. v. Hayes* (Cal.), 8 Pac. 692; *Shirley v. Bishop*, 67 Cal. 543, 8 Pac. 82; *Hallock v. Suitor*, 37 Or. 9, 60 Pac. 384; *Haines v. Hall*, 17 Or. 165, 20 Pac. 831, 3 L. R. A. 609.) Courts of equity will not be reversed because of the admission of incompetent or imma-

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terial testimony, for the reason that the presumption is that the court in arriving at its decision considered material and competent testimony only. (*King v. Pony G. Min. Co.*, 28 Mont. 74, 72 Pac. 309; *Tague v. John Caplice Co.*, 28 Mont. 51, 72 Pac. 297; *Metcalf v. Bockoven* (Neb.), 96 N. W. 406.)

STOCKSLAGER, J.—On the twentieth day of March, 1903, respondents in this action filed a complaint in the district court of Nez Perce county against the appellants, setting out facts which, in the opinion of the district judge, warranted the issue of an injunction restraining certain acts until the further order of the court. Thereafter, and on the twenty-seventh day of March following, plaintiffs filed an amended complaint. The first paragraph alleges that plaintiffs are copartners, doing business at Lewiston, Idaho, under the firm name and style of Small & Emery and that they are engaged in the manufacture, wholesale and retail, of lumber, shingles, etc. Second: That since the twentieth day of August, 1896, plaintiffs have been in the active possession of and operating a sawmill, situated on the south shore of the Clearwater river at Lewiston, and that plaintiffs have operated said mill and are operating it for the purpose of manufacturing lumber and building material for wholesale and retail trade. That ever since said last mentioned dates plaintiffs have owned large quantities of logs on and along said river about eighty miles above plaintiffs' said sawmill; that all logs sawed or manufactured into lumber at said mill have been procured on and along said river and its tributaries at points all the way from forty-five to eighty miles above the site of said mill. That the only means of transportation of logs to said mill is by floating them down said river in rafts or drives.

The third allegation is that the Clearwater river is a navigable stream and that the plaintiffs and the public generally from time immemorial have used the same for the purpose of driving and floating logs, rafts, etc., down the same; that it is usual every spring between the 10th of February and the 1st of July for said stream to rise, caused by the melting snow in the mountains. That it is impracticable and impossible to drive

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or float rafts or drives of sawlogs from any point fifty miles above the site of said mill down said river only during the rise thereof. That plaintiffs have purchased and contracted about two million feet of logs to be floated down said stream and delivered at their said sawmill as soon as they can be delivered. That said timber last above mentioned is situated about fifty miles above said sawmill; that plaintiffs have purchased, and are now purchasing, divers other large quantities of sawlogs which they intend to float down said river when the spring rise comes. That defendants are operating, or claim to be operating a sawmill on the south shore of said Clearwater river about one-fourth mile above the site of plaintiff's sawmill; that there is in said Clearwater river a certain island which commences at a point about a quarter of a mile above the sawmill of defendants and extends down said river to a point a short distance below the sawmill of plaintiffs. That the upper point of said island is very narrow for some distance, but that going down said river it gradually widens until it is about four hundred feet wide; that said upper point is about one hundred and fifty feet from the south shore of said river at and near the site of defendants' sawmill; that the current of said river is divided at the upper point of said island, one part of said current or channel running and flowing along the south shore of said river and the other part of said current or channel flowing on the north side of said island; that in driving and floating rafts and drives of said logs and timbers down said river to the site of defendants' said mill it is necessary that said sawlogs be floated in the channel or current on the south side of said island; that if said logs are permitted to get on the north side of said island, or in the current or channel on the north side of said island, they are carried down said Clearwater river beyond the site of plaintiff's mill and into Snake river and become unmanageable and lost; that said defendants are proceeding to build, and are wrongfully and unlawfully building, a series of piers composed of large and divers quantities of piles of rock, stone and timber in said Clearwater river diagonally across the said south channel of said river from the site of defendants' said mill to the point of said island where said

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current or channel is divided by the point of said island, and give out and threaten that they will build and complete the said series of piers diagonally across said river in an upper direction to a point where said current or channel is divided and obstruct the passage of said south channel; that if said piers are completed and extended by defendants as aforesaid, said channel will be obstructed and it will be impossible to pass any raft or drive of logs or other crafts or deliver any logs brought down said river at the site of plaintiffs' sawmill; that the building of said piers will obstruct the free passage and use of said channel, and the public generally will be prevented from freely using the same. That by reason of the plaintiffs being prevented from the use of said channel by the construction of said piers they will suffer great and irreparable damage and injury; that when said plaintiffs come to float their said logs down said channel the said piers will cause said logs to be stranded thereon or will turn said logs into the north channel and cause them to be carried beyond plaintiff's mill and into Snake river, and thereby cause the plaintiffs to lose the same and cause plaintiffs great damage in the sum of at least \$12,000. That defendants will continue to construct the said piers unless restrained by the court; that they have already built seven piers in and across said channel or current as aforesaid; that said piers are at least twelve feet wide, and one of them at least one hundred feet long, and that all of said piers average about five feet in height—that is to say, five feet above the surface of the water, and if said piers are completed said channel will be completely obstructed and it will be impossible to float or drive logs through the same.

The fourth allegation is that the Clearwater river at the point where the piers are being built is, and ever has been, navigable, and said south channel is, and ever has been, navigable, and that the public has used the same for passing, floating and driving rafts and drives of logs and other crafts down from time immemorial, and plaintiffs have used the same for said purposes ever since they first established their sawmill; that said south channel is the only way or means by which plaintiffs can transport, convey or deliver logs at their said sawmill. That

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at all times mentioned plaintiffs and the public have had the right to use said channel, and that neither of said defendants have any right to obstruct the free passage of the same.

The fifth alleges the insolvency of defendants, and inability to respond in damages, and further alleges that defendants established their said mill and began the use of said south channel long subsequent to the time that plaintiffs began the operation of said mill and commenced the use of said Clearwater river, and further alleges that said defendants have committed a public nuisance by reason of their acts aforesaid.

Then follows prayer for injunction, restraining defendants from building, constructing, completing or continuing the said piers or otherwise obstructing the free passage or use of said river, and particularly the south channel or current thereof. That on final hearing the injunction be made perpetual. That the said nuisance be abated and that plaintiffs have their costs.

Defendants answering admit paragraph 1 of the complaint. Paragraph 2 is denied for the want of information and belief sufficient to enable them to answer.

Answering paragraph 3, defendants admit that the Clearwater river at the time herein mentioned is a navigable stream at a certain season of the year. Deny that it is practicably navigable except during high water in said stream, and admit that plaintiffs and the public generally have during the past ten years, but not from time immemorial, used for floating logs, rafts, timber, etc., down the same during the high water, and admit that it is usual during late spring and early summer, to wit, during the last days of May and the month of June, for the Clearwater to rise; but deny that it is usual for said river to rise or be at the stage of high water at any other season of the year. Admit that said rise is caused by melting snow. Admit that it is impracticable and impossible to float rafts, etc., from any point fifty miles above the site of said sawmill, only during high water. As to allegation that plaintiffs have contracted for about two million feet of said logs to be floated down said river to said mill, and have purchased and are purchasing other large quantities of sawlogs to be floated down said river to said mill when said spring rise comes, these de-

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defendants have no information or belief upon the subject sufficient to enable them to answer that allegation, and therefore deny the same and place their denial on that ground. Admit that defendants are actually operating a sawmill on the south shore of the Clearwater river about one-fourth mile above the site of plaintiffs' mill. Deny that there is in said river any island which commences at a point about one-fourth mile above the sawmill of defendants or extends down said river to the point a short distance below the sawmill of defendants. Aver the fact to be that there is, except in high water, a strip of land or sandbar commencing nearly opposite in the Clearwater river of the plaintiff's said sawmill and extending between the slough and channel of the Clearwater river westerly, but admit that in extreme low water the said line of land extends to a point far above the site of defendants' mill, and that in extreme low stages of water that the upper portion of said strip is simply riffles of water flowing slowly over gravel on said bar. Deny that said alleged island at its upper point is very narrow for some distance; deny that it widens to the width of four hundred feet at ordinary stages of water at its lower end, or any other or greater width than two hundred feet at ordinary stages of water. Deny that said upper point is only about one hundred and fifty feet from the south shore of said river at or near defendants' sawmill, but aver the fact to be that the said strip of land and said bar are about two hundred feet to the north of the south shore line at high water of said river at and near the site of defendants' mill. Deny that the current or channel of said river is divided at the upper point of the so-called island; or that there is any island other than stated in this answer, and deny all the allegations of plaintiffs' complaint with reference to the necessity for the use of what is known as the south channel to land logs at plaintiffs' mill, or that the piers will cause the logs, rafts, etc., to pass plaintiffs' mill and be carried into Snake river as alleged in the complaint. Deny all that part of the complaint that alleges that defendants are constructing piers diagonally, or otherwise, across said south channel of Clearwater river, or at all, as alleged in the complaint, or that the building of the piers will in any manner interfere with the

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plaintiffs or cause them any damage whatever. Deny that if defendants are not restrained by an injunctive order of the court they will continue to construct or build said piers, but aver the fact to be that all of defendants' piers were built, constructed and completed prior to the time of plaintiffs' filing their original complaint, or any complaint in the cause, and deny that the defendants have made any threats; deny that by said piers they have obstructed the free passage or use of said river. Deny that the defendants are now proceeding to wrongfully or unlawfully build or complete said series of piers, but aver that all piers are long since completed that have been or are to be built by defendants during the present season. Admit that they have built during the present season five piers, and no more, but deny that they are in or across the said south channel or current of said river. Deny that said piers are at least twelve feet wide, but aver that said piers built the present season are six by ten feet and admit that one of the piers is about one hundred feet long; deny that said piers average five feet in height and that they extend five feet or any more than three feet above the surface of the water at low water.

The fourth denies all the allegations in paragraph 4 of the complaint.

The fifth denies all the allegations in paragraph 5 of the complaint.

For second and fourth defense to the complaint defendants allege: First, that the defendants are partners in the said mill business at Lewiston, Idaho; the second averment is that defendants are the owners of the land upon which their mill is located, describing it. Third describes a tract of land to the west of the tract upon which their mill is located alleged to have been purchased by Starr W. Scofield of William Phillips, and that the slip or channel on which is held the logs or timber to be sawed in said mill, and for securing and holding the same in place, is situated the piers, five in number, together with the slip or boom piers and the terminal piers. Fourth avers that said slip and piers are all at the western terminus of the slough upon the Clearwater river, and the same has been largely improved and placed in its present condition by open-

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ing the said slough and extending the same to the mill of defendants, so that the slip and piers serve the purpose of receiving and holding not to exceed one hundred thousand feet of logs for the use of defendants' mill, the capacity of which is thirty to forty thousand feet of said lumber in ten hours, and without which said slips and piers the milling operations of defendants cannot be successfully conducted, and the same are in no way an obstruction to the free use and navigation of the Clearwater river, and are entirely within and upon land conveyed by the United States government to the predecessors of defendants, and the said slips or piers and the use made of them are in no way unreasonable or improper uses of the said river as a navigable stream. Fourth, that said portion of ground upon which is situated said mill of defendants, and the slips and piers of defendants have been used for milling and logging and log-holding purposes by the defendants and predecessors in the sawmill business for over a period of twenty years as defendants are informed and believe, and so allege. The previous slips, booms and piers of the predecessors of these defendants extending further beyond and causing more space than those of defendants', and neither the slips, booms or piers of these defendants or their predecessors have been, or now are, an unreasonable use of any portion of the Clearwater river or in any way a nuisance on or along the border of said river, but is a suitable and proper use of the defendants and their predecessors' own property adjoining and abutting upon a navigable stream.

For a third and separate defense defendants plead a trial in the court of Samuel L. Thompson, a justice of the peace of West Lewiston precinct, wherein they were charged with willfully and unlawfully obstructing the free passage and use of the Clearwater river, which was a navigable stream, by floating in said river the obstructions complained of in this action. That a trial was had in said justice's court, with a jury, and they were acquitted of said charge, and that it is a bar to this action.

On May 8th, defendants, by leave of court, filed an amendment to their amended complaint, amending paragraph 2 of said amended complaint, by alleging that ever since the twen-

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tieth day of August, 1896, plaintiffs have been the owners entitled to and in the active possession of and operating a certain sawmill thereupon described, and now are entitled to the exclusive possession of the lands and premises upon which said sawmill plant is situated as the lessees thereof, etc. The remainder of the allegation is covered by other allegations of the complaint.

We have set out very fully the substance of the pleadings in this case in order that the true situation may be fully understood.

The case was tried without a jury, and on the nineteenth day of June, 1903, the court filed findings of fact, conclusions of law and decree, which were in favor of the plaintiffs. The language of the decree is that the temporary restraining order heretofore issued and served upon defendants herein be, and the same is hereby, made absolute and perpetual, and it is hereby further ordered, adjudged and decreed that the said defendants—naming them—their agents, servants, employees and all others acting under them be, and they are hereby, perpetually enjoined and restrained from in any manner building, erecting, constructing or completing piers in or across the south channel of the Clearwater river from the site of defendant's sawmill on the south shore of said Clearwater river in the city of Lewiston to the island in said river, or at any other place in or across said south channel above the sawmill site of Small & Emery, or in building or placing any other piers in or across said south channel at the point of said piers, or in otherwise obstructing the free passage or use in the customary manner of said south shore of said Clearwater river. Judgment was entered for costs on the twenty-fourth day of June, 1903, and defendants filed their motion for a new trial alleging: 1. Insufficiency of the evidence to justify the decision of the court and that the decision is against law; 2. Errors of law occurring on the trial and excepted to by the defendants' said motion will be made upon bills of exception and a statement of the case. On the seventh day of December, 1903, the motion for a new trial was denied. The appeal is from the judgment and the order overruling the motion for a new trial.

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It seems this case had a stormy career from the time the motion for a new trial was filed until the statement was settled. The record, from page 50 to and including part of page 92, is consumed with motions and affidavits in opposition to such settlement which are met by counter-affidavits of appellants in an effort to justify any laches that are urged by respondent. It is sufficient to say that the court did settle the statement on the seventh day of December, 1903, and we are disposed to accept his conclusions.

Many of the assignments of error are based upon the ruling of the court in the admission or rejection of evidence. In the trial of equity cases the rule seems to be that courts are very liberal in the admission of evidence, the theory being that in the final determination of the action, only such evidence as is competent and pertinent to the issues will be considered. We are aware that this rule is subject to abuse and if carried too far might work a great hardship and injury to either party to the litigation.

We have considered the errors assigned on this ground in the case at bar and do not feel inclined to hold that any evidence was admitted that was misleading or calculated to misdirect the court on the material issues involved. If it were made to appear by the record that the court based any material finding or conclusion on evidence that should have been excluded as not being relevant to the issues, or for any other reason, then we would not feel inclined to hold that the court could admit any and all kinds of evidence and be justified under the liberal rule above suggested.

For recent discussions of this question, see *King v. Penny Gold Min. Co. et al.*, 28 Mont. 74, 72 Pac. 309; *Metcalf et al. v. Bockoven* (Neb.), 96 N. W. 406.

Counsel for appellants urge that if they have created a nuisance at the place and in the manner named, the plaintiffs cannot be heard to complain as private citizens. That if a nuisance is to be removed from a navigable stream of the state, it must be at the instance of the attorney general on behalf of the state.

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Section 3633, Revised Statutes of this state, provides that "A private person may maintain an action for a public nuisance if it is specially injurious to himself, but not otherwise." This section of our statute has been construed by this court in *Redway et al. v. Moore*, 3 Idaho, 312, 29 Pac. 104. In construing this section the court, speaking through its chief justice (Sullivan), said: "Under the provisions of that section a private person may have his action to abate or restrain the continuance of a public nuisance provided he alleges and shows that such nuisance is specially injurious to himself; see authorities cited." We think this a correct construction of the statute, and further, that the parties brought themselves within its terms in this complaint. They allege special damage to themselves by reason of the obstruction of the south channel of the Clearwater river, and state in plain and concise language the reasons why their damage is different from that of the general public; whether they were able to establish this allegation or not has nothing to do with the pleading.

Counsel for appellants also urge with much enthusiasm and ability that the court erred in not permitting the appellants to show that the defendants, or some of them, had been arrested on a criminal complaint and tried in a justice court of one of the precincts of the city of Lewiston on the charge of maintaining a public nuisance involving the identical question involved in this case; that the case was tried by a jury duly and properly selected, and that after a full and fair investigation defendants were acquitted; that said judgment is a bar to this action. We do not think the court erred in this ruling. The mere fact that the jury did not convict defendants of maintaining a nuisance is no bar to a civil action to require defendants to abate the nuisance, and this is especially true where it is shown that neither of the plaintiffs was the complainant in the criminal action. If the contention of counsel for appellant is to be upheld, it is equivalent to saying that an acquittal of a charge of grand larceny by a jury regularly selected would be a bar to the recovery of the property alleged to have been stolen in an action of claim and delivery.

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It is next urged that the piers were completed before the restraining order was served upon the defendants, and for that reason the order was improperly issued and should have been annulled by the court when that fact was established. If the work was completed as contemplated by the defendants at the time the restraining order was served it could serve no purpose derogatory to the rights or interests of the defendants and was entirely harmless so far as they were concerned. We find no order requiring the defendants to remove any obstruction placed in the Clearwater river; neither does the decree require the defendants to remove the obstructions already placed in said stream, only to desist from completing the work of the alleged obstruction.

The serious and all-important question before us for determination, and the one we approach with much delicacy, is: Was the evidence sufficient to support the judgment? Whilst the rule in equity cases as enunciated by the courts generally, and this court repeatedly, is not as stringent as in law cases, it is the policy of the appellate courts to sustain the judgment of the trial courts when it can be done without apparent infringement of the rights of litigants. The learned judge before whom the respective rights of the parties to this action were submitted, found for the plaintiffs, rendered a decree accordingly, and afterward refused to grant defendants a new trial.

It is shown that this litigation is between rival mill owners on what is termed the south channel of the Clearwater river as it flows by the city of Lewiston. No one else has any interest in the result of the litigation so far as the record shows. Before the plaintiffs were entitled to a restraining order, such as was issued on the final determination of this action, and judgment rendered, it was necessary for them to establish by a fair preponderance of the evidence that the use made of said stream by appellants was unauthorized, unreasonable or unnecessary. Albert Small was the first witness who testified for plaintiffs. After testifying to the partnership and business of himself and company, plaintiffs, that they were the owners of the sawmill and had been at its present site for the past six

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years, and that they rent the millsite from Volmer & Scott, that the Harrington & Parkyn mill is on the south shore about one-fourth of a mile above the Small & Emery mill, says both mills are situated on the south bank of the south channel of the Clearwater river.

Fred W. Emery testifies as to a conversation with defendants two or three days before the injunction was issued or filed. As he states it, they had a gang of men constructing piers; they had several of them. The bottom of the piers laid out and built part way up, and I talked with them with regard to leaving an opening to get through. We could not get through them. The piers were built of rock and timber and cribbed up with timber and filled with rocks; one was one hundred feet long, probably twelve feet wide; I took it to be about five feet above low water. The other piers looked to me to be built somewhere at the bottom about ten or twelve feet long and six or eight feet high. There were five that I counted at that time, piers, in the course of construction; the one hundred foot pier was completed. The one at the outer end of the island probably ten or twelve feet square—these piers extended one hundred to one hundred and fifty feet from the bank out to the point where the channel was cut or parted by the island. The outer pier extended out where it was all out of water in low water. The old raft channel runs through where this long pier is. Right by the corner of the mill there is the deepest water. There was no way of rafting logs through these piers as they were being constructed when the water was down. The only way was to cut the raft to pieces and shove them through a log at a time.

Albert Small testified to seeing parties at work about the 12th of April, 1903, constructing piers, their manner of construction, etc. Emery and Small both testified that there was no other means of getting their logs along the Clearwater down to their mill except by rafting and driving them down the Clearwater river. Emery says during the spring rise logs cannot be taken down the north channel of the river and landed at their mill. The way the mill is situated the island runs down at the north of the mill, and if we come down the north

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channel we pass our mill before we get to the foot of the island and could not get a raft in if we tried. During the spring rise if rafts or drives are not landed at our mill they go into Snake river. These piers extend from defendants' mill diagonally upstream across the south channel to where the current of the river is divided. Small says: "The piers stop navigation practically with anything but a small boat or any small conveyance. It is not possible to take a raft of logs and land it at our millsite by going to the north of these piers."

Charles Adams testified: "I have been running logs and rafts on the Clearwater river ever since four years before 1877. In coming down the Clearwater river we would have to go down the south side of the channel all the time to reach the Small & Emery mill. You could not take a raft around that east pier—that is, north of it—and then land it at Small & Emery's mill because it would take us on the main river; danger of coming into the Snake, certainly lose the raft."

George White testified that there is no other way to get a raft to Lewiston other than bringing it down the south channel of the Clearwater river.

James C. Evans testified: "I used this south channel in bringing these rafts down and landing them at the Small & Emery mill. That was the usual way to bring logs down. I saw the piers that were being put in the south channel along in April. I saw them before any of them were broken or washed out. Well, I think they stopped the running of rafts. You could not run rafts through them. I do not think a person bringing a raft down the Clearwater river could get north of the piers and land at Small & Emery's mill. A draught of water would take him beyond the bar or into the main river. It would take him down the Snake below Small & Emery's mill."

Captain Ephriam W. Baughman testified: "I know where the sawmill of Small & Emery is situated. I hardly think it would be possible to bring logs and rafts of logs down the Clearwater river and land them at the sawmill of Small & Emery without bringing them through the south channel. That is my idea; it couldn't be possible. If you miss the south channel I do not think you could stop it. I am sure you could not

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unless you had a very strong line to get in around the island. I do not think it would be possible to get it in after getting it outside on the north side of the island. It would go down in spite of all they could do with oars or power that could get on the raft."

This is the evidence upon which learned counsel for respondents ask the court to sustain the judgment of the lower court. It is largely copied from their brief, and an examination of the record discloses that it is a fair synopsis of the evidence given by the witnesses on behalf of the plaintiffs. At the close of plaintiffs' evidence defendants moved for a nonsuit on the ground of an objection to the amendment of the complaint, and further that the only injury attempted to be shown in this case is one resulting from an alleged infraction of a common right; and that there is no evidence to show that the defendants have made any unreasonable or imprudent use of their millsite or of their right to construct piers in a navigable stream; that the evidence shows that plaintiffs and defendants both maintain mills and are simply competing companies; that the evidence shows that there is no careless exercise of the public right and no reckless use thereof shown; that an individual cannot maintain an action for the enforcement of a common right such as is attempted to be shown in this case, and that the private appropriation of a portion of a navigable stream is not shown to be a nuisance of which the court will take any notice or knowledge. This motion was overruled, and we think properly so. The filing of the amendment to the complaint was a matter largely within the discretion of the court, and we find no abuse of his discretion. We find no error in overruling the motion for nonsuit on any of the grounds alleged in the motion.

Defendants then called Jacob Sharrah as a witness, who testified that he had resided in Lewiston twenty-one years and his occupation teamster. Knows the location of both sawmills and has hauled lumber and wood for both companies. "I know of logs coming to the Small & Emery millsite soon after I come here. Elliott & Emery I believe brought a drive of logs to this same location where their mill now is, and the drive

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was all brought together, I think, with Mr. Harrington's. I don't think anything about it; I know it. I know Mr. Harrington and Emery & Elliott's drive was brought together in one drive, and right at the point of this island there was a place arranged there to divide the logs. They ran one drive into the slough where they had a boom to hold the logs, and the others they had a boom on the outside of the island. To the north of the island in the main Clearwater river they ran that drive down the Clearwater river to the mouth of the slough, the Emery & Elliott slough, now the Small & Emery mill slough, and backed them into the slough where there was deep water where they had no trouble in holding them. Yes, sir; they came out north of what they designate as the island north of their millsite and went to the west end of the island. Harrington sent his logs down the other slough. He further testifies that Al Smith brought a drive of logs to the Emery & Small mill and they were handled in the same way. Asked if there was any trouble in bringing logs down that way, said there is no trouble at the same time of the year they were brought down there. It was in low water brought down generally from September to February and March before the water began to rise much. I am pretty certain it was in September when Mr. Smith brought his logs down on the north side of the island. It was twenty years ago this summer that Smith brought his logs down. When I first came here there was no passageway between these mills for the floating of logs. No water ran through there at all. To the best of my recollection there has not been any water run through that slough until about four or five years ago since I have been here—that is, at low-water mark."

E. G. Cummings testified as to the accuracy of the pictures marked as defendants' exhibits.

J. D. Seibert testified that he was engaged in logging and rafting on the Clearwater river, and has been so engaged three or four years; acts as pilot on rafts; thinks he is familiar with the channel and currents of the river; knows the situation of both mills; familiar with the channel and currents between those mills; has noticed some piers east of the Harrington &

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Parkyn mill. After describing the piers—has run rafts over that ground to the east of the Harrington & Parkyn mill between the waterworks or pumping-plant station and these mills. "Well, with the piers there it would be the proper plan to go around outside of it to the north side of it. To the north of these piers is a suitable and proper passageway for rafts at a rafting stage of water to get into the Small & Emery mill; a man can get in there. About two feet is the average rise in water to enable the average raftsmen to come down the river. At two feet of water I don't think you can safely pass to the north of the piers with a raft and go into the Small & Emery slough; stick on the bar below. No trouble in getting by these piers at that stage. I don't think so. That shallow piece of water you would get stuck on or have trouble with is almost north and northwest of the Harrington & Parkyn mill, and even in the mouth of the slough that leads to the Small & Emery sawmill down below the Harrington mill. I have noticed the stage of the water yesterday; not to-day. You could keep outside of those piers at that stage of the water to the north and go into the Small & Emery slough. At still higher stages, the higher the water the better to keep outside of the piers. You couldn't get into the channel on the north side; the north side channel it would be impossible. With a low stage of water you couldn't get into the north channel. I ran twenty-two rafts down the last year on the Clearwater. I don't remember how many the year before—nine or ten. I am engaged in that business all the time when there is a rafting stage of water."

J. T. Hamm testified that he helped to construct a portion of those piers. "I think my first time there to take any notice of the piers was about the 24th of December last. I know of rafts being passed down by the Harrington & Parkyn sawmill. Since that time on the 4th of April, 1903, there was a raft went on the north of it run down. It was a raft that Small & Emery bought above, and they run it on the north side of the pier. Mr. Emery was there with another raft that came in prior to this, and they were cutting those logs loose and these gentlemen wanted to sell them this other raft and went down

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and spoke to Emery and says, 'I will sell you the raft, but we want to take it on the outside of the piers.' Mr. Parkyn said that. He spoke to Emery and said, 'We want you to buy this raft of course, but understand, we want to make a test of this to see whether the raft can be run on the outside on this point, outside the piers, and that Harrington & Parkyn's responsibility is behind this raft if it is lost and we will take it around.' However, there was no definite answer made in regard to that, and we started up to the raft. 'Now,' says Mr. Parkyn, 'you say that that can't be run around there—he said this to Emery—I think it can, and we will make a test case of it.' Mr. Parkyn and the man that had the raft started down the river to run around the piers, and they come down all right and tied up the raft." On cross-examination said he was an employee of the defendants.

George A. Frost testified he had resided in Lewiston thirty-two years and gave a description of the river in its various changes since that time. What is termed the south channel is not as it was when he first knew it. Followed boating, logging and rafting on the Clearwater a number of years. Has taken rafts to the site of Small & Emery's mill, through what is called the north channel, but conditions have changed since the construction of the two mills and does not enlighten the court very much.

J. O. Maxon, recalled for defendants, testified: Was engaged in rafting from 1873 to 1881 on the Clearwater; knows the present condition of the channels at Lewiston and the situation of the piers. "The east pier stands just barely on the edge of the water in low water, as far as my remembrance serves me. From my experience as a raftsman I would say as to the taking of rafts north of the east pier and landing at Small & Emery's mill as the river now is at the present stage of water, it can be done easily. It can be done at a reasonable rafting stage."

Jacob Taylor testified he had been engaged in logging on the Clearwater seven years; is a pilot; ran twenty-eight rafts last year; is familiar with the rafting business; is familiar with the water between the power-house to the mouth of the slough

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below the Small & Emery mill; knows where the piers are located. "Low water permits the running of rafts between the power-house and the Small & Emery mill, and what we raftsmen call low-water running stage. Whenever the upper river is so we can clearly run rafts with safety we can't go through the slough. The obstruction comes with reference to going through the slough at such stage just below the Harrington & Parkyn mill between that and Emery's mill. To pass between the power-house and the Small & Emery slough, we have to have, I should judge, anyhow four feet above low water up in the main river, and with four feet of water above low-water mark I can pass to the north of the piers of the Harrington & Parkyn mill with safety and easily. I consider it a suitable and proper passageway for rafts coming through from the power-house to Small & Emery's slough or mill. I would consider that I could run a raft around to the north of the piers at any time. I can run a raft on the river and go to this mill—Small & Emery's mill. I was on the river about the 28th of March with a raft at the power-house. Mr. Emery got the raft. We stopped the raft at the landing with a rope, and Fred Emery told me to take the raft on down and run it on to Parkyn's piers and stop it there. Well, I didn't want to go down on the piers because I didn't want to knock those piers out— He said Benson is about there and we want to get that down, and I run the raft down and let the piers stop the raft. The raft knocked one pier over and lodged against another one and stopped." William Benson testified that he was a raftsman and knew the river from the power-house to Small & Emery's mill. Somewhere about the 13th or 14th of April he took a raft of telephone poles from the power-house north of the piers and landed it just above Small & Emery's mill. It was a hard raft to handle. Water was low at the time.

C. E. Stebbins testified that he helped to construct the piers; thinks it is about two hundred feet from the piers to the north of the bar. When we built the east pier there was about eighteen inches of water around it. The water got deeper out from the pier.

William W. McCort testified he assisted in the construction of the piers.

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Frank Parkyn testified as to the construction of the piers, that it is possible to take a raft north of the piers. There is never a raft nearly so wide as the deep water north of the piers; there is never any rafts wide enough to fill the space available. Took a raft bought of Thomas by Emery past the piers, and landed it at Small & Emery's mill. Testified that he had tested the channel by dropping chunks and sticks in the channel north of the piers, and that they did not go to the north channel of the river.

Some witnesses were called in rebuttal, but in our view of the case it was on unimportant, immaterial issues, except the evidence of Mr. F. W. Emery, who testified with reference to the raft taken by the piers by Mr. Parkyn. He called it a "little skate of a raft," and said he did not see it go by the piers.

Applying the law as we understand it to the facts in this case, we do not think this judgment can be sustained. The legislature in providing for the construction of dams and booms in the rivers and creeks of the state, in section 835, Revised Statutes, says: "No dam or boom must be hereafter constructed or permitted on any creek or river unless said dam or boom has connected therewith a sluiceway, lock or fixture sufficient and so arranged as to permit timber to pass around, through or over said dam or boom without unreasonable delay or hindrance." It will be observed that the legislature by that section has provided for the use of the streams of the state for logging purposes, and has provided such safeguards as will best protect all concerned. By the terms of this section of our statute, there can be no question of the right of appellants to construct the piers complained of if they have so constructed them as to permit others to use the stream without unreasonable delay or hindrance. It seems that only the two mill companies, the appellants and respondents in this action, are using the channel where the piers are constructed, but this fact has nothing to do with the situation. If the piers are not constructed as contemplated by the statute, the judgment should be affirmed. The act of the legislature legalized the construction of the piers with certain restrictions. In *Dutton v. Strong*, 1 Black (U.

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S.), 1, 17 L. ed. 29, Mr. Justice Clifford says: "Bridge piers and landing places, as well as wharves and permanent piers, are frequently constructed by the riparian proprietor on the shores of navigable rivers, bays and arms of the sea, and where they conform to the regulations of the state and do not extend below low-water mark, it has never been held that they were a nuisance, unless it appeared they were an obstruction to the paramount right of navigation. Whether a nuisance or not is a question of fact; and where they are confined to the shore, and no positive law or regulation was violated in their erection, the presumption is that they are not an obstruction, and he who alleges the contrary must prove it." (See in *Yates v. Milwaukee*, 77 U. S. 497, 19 L. ed. 986.)

In *Stevens Point Boom Co. v. Riley*, 46 Wis. 237, 49 N. W. 978, it is said: "The right in question [maintaining a boom] necessarily implies some intrusion into navigable water at peril of obstructing navigation."

In *Attorney General v. Ewart Booming Co.*, 34 Mich. 462, the court says: "But like common carriers (boom companies) on the same route, which in a certain sense they are, they must put up with these inconveniences arising from (appropriations of parts of streams) so far as they are not reasonably avoided; they constitute no nuisance, and neither party conducting its business in a proper and prudent manner can be subject to either public or private complaint. Any injury under such management must be considered incidental to and inseparable from the exercise of a general right." (See Farnham on Water and Water Rights, p. 430.)

In *Lancy v. Clifford*, 54 Me. 487, 92 Am. Dec. 561, may be found a very full discussion of this question. Many other authorities are cited by appellants in support of their various contentions, but we do not think it necessary to quote further from them. The rule governing cases of this character is that all parties interested in the free use of a navigable stream are subject to conditions that may exist in each particular case. No one has the right to arbitrarily obstruct a stream to the detriment or injury of his neighbor; each one is entitled to the free and reasonable use of the navigable streams of this state,

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and may place such reasonable obstructions on the stream so long as they serve a useful and beneficial purpose and leave a reasonable use to others interested. In this case we cannot say the piers were unreasonable or not necessary for the appellants in the enjoyment of their rights on the stream. If an obstruction merely impairs or renders more difficult the navigation without destroying it, an individual has no rightful cause for complaint, because he has no right to insist on the best possible accommodation. In this case we are not satisfied that in reasonable stages of water rafts cannot be taken to the north of defendants' piers and landed at the Small & Emery mill; indeed, we think the evidence abundantly establishes the fact that such is the case.

It is urged by counsel for appellants that the court neglected to find on all the issues involved. As there is to be a new trial granted, we suggest that the court should find on all the material issues in the case. We have already passed upon all, or nearly all, of the errors assigned, many of them in groups, and some without singling them out. We apprehend the trial court will have no difficulty in the next trial of this case in determining the views of this court.

The judgment is reversed and remanded for further proceedings in harmony with this opinion. Costs awarded to appellants.

Sullivan, C. J., and Ailshie, J., concur.

(January 14, 1905.)

STATE v. NELSON.

[79 Pac. 79.]

ORDINANCES OF CITIES UNCONSTITUTIONAL WHEN—MAY PROHIBIT WOMEN FROM ENTERING SALOONS FOR IMMORAL PURPOSES—REASONABLENESS OF FINE FOR VIOLATION.

1. An ordinance that provides: "It shall be unlawful for any person maintaining any saloon, barroom or drinking-shop, or any

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apartment thereto attached, to permit females to enter their said places of business," is unconstitutional.

2. A city may by ordinance prohibit females from entering places where intoxicating liquors are sold for immoral purposes.

3. An ordinance that provides a punishment by fine of not less than \$25 nor more than \$200, or by imprisonment in the city jail for not less than ten days nor more than sixty days for violation of an ordinance that prohibits females from entering their places of business for immoral purposes, is not void or unconstitutional, for the reason that it is unreasonable or oppressive.

(Syllabus by the court.)

APPEAL from the District Court of Ada County. Honorable George H. Stewart, Judge.

Appellant tried in district court, found guilty and fined, from which judgment he appealed. Reversed.

The facts are stated in the opinion.

C. C. Cavanah, for Appellant.

The opinion contains all the leading authorities upon the points decided by the court cited by appellant's attorney.

C. F. Neal and B. F. Kinyon, for Respondent.

The occupation of appellant (that of retailing intoxicating liquors) is one in which he had no inherent and infeasible right to engage. (*Black on Intoxicating Liquors*, secs. 37, 39; *Giozza v. Tiernan*, 148 U. S. 657, 13 Sup. Ct. Rep. 721, 37 L. ed. 599; *Bartemyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929; *License Cases*, 5 How. 504, 12 L. ed. 256; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273, 31 L. ed. 205; *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. Rep. 13, 34 L. ed. 620.) Section 2 of article 12 of the constitution of the state of Idaho provides: "Any county or incorporated city or town may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with its charter or with the general laws." The ordinances in controversy are valid exercise of the authority conferred by the charter of Boise city and are reasonable police regulations. (*Cronin v. Adams*, 192 U. S. 108, 24 Sup. Ct. Rep. 219, 48 L. ed. 365.)

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STOCKSLAGER, C. J.—This action was commenced before the police magistrate of Boise, and charged defendant with permitting a female, one Rena Morrow, to enter and remain in a saloon maintained by defendant, in violation of an ordinance of the said city. A trial was had and defendant was convicted in that court, and an appeal taken to the district court. A trial was had in that court at the February, 1904, term, and defendant was convicted and sentenced to pay a fine of \$25 and costs. The appeal is from this judgment.

This prosecution is based on the following section of the ordinance of the city of Boise: "Section 858. It shall be unlawful for any person maintaining any saloon, barroom or drinking-shop, or any apartment thereto attached, to permit females to enter their said place of business or maintain any sign, or offer any inducement or any invitation to females to enter any such saloon, barroom or drinking-shop kept within the city of Boise. Approved Sept. 24, 1903."

This section was introduced in evidence and was the state's exhibit "A." State's exhibit "B" follows: "Any person violating any of the provisions of sections 855, 856, 857 or 858, shall, upon conviction before the police magistrate be punished by a fine not less than \$25, nor more than \$200, or by imprisonment in the city jail for not less than ten days nor more than sixty days." Section 872 provides: "In all cases where a fine shall be imposed upon a person for a violation of any of the ordinances of said Boise city, such fine may be collected under the ordinances of said city and laws of Idaho, or by imprisonment at hard labor in the city prison, or by working any person sentenced to such imprisonment upon the streets, parks, public squares, workhouse or house of correction, during the term thereof, until such fine and costs be paid, at the rate of one day for every two dollars of said fine and costs, provided the total time of imprisonment shall not exceed sixty days."

It is first urged by counsel for appellant that "this objection to the introduction in evidence of sections 858, 859 [plaintiff's exhibits 'A' and 'B'], should have been sustained, for the reason that such sections of the revised ordinances of Boise city are invalid, void, unreasonable and an interference with

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individual liberty granted to the citizens of Idaho by the constitutional laws of Idaho, and in its operation imposes an unjust and illegal punishment upon the owners of places where liquors are sold, whenever a female enters said places, although she may enter there upon lawful business, and creates an unequal, unjust and illegal discrimination against women who enter such places upon lawful business."

This seems from the record to be the sole question presented for our consideration in this appeal. If the section of the ordinance, state's exhibit "A," is valid, we do not think the penalty provided by state's exhibit "B" too severe. The evident intent of both sections above referred to is in the interest of morals and for the general good of the people of the city. All good citizens should join in an effort to protect the people from immoral influences, and especially the young people of the community. With this object in view, we will examine the provisions of the ordinance in controversy. In support of his contention that the provision of the ordinance under discussion is invalid, void, unreasonable and an interference with individual liberty, counsel for appellant cites *Gastenau v. Commonwealth*, 108 Ky. 473, 94 Am. St. Rep. 386, 56 S. W. 705, 49 L. R. A. 111. The ordinance in that case is dissimilar in some particulars to the one under consideration, but the reasons for declaring the ordinance unconstitutional seem to be applicable to the case at bar. The language of the ordinance is as follows: "Be it ordained by the board of council of the city of Middlesboro, Bell county, Ky.: (1) That it shall be unlawful for any woman to go in and out of any building where a saloon is kept offering for sale any spirituous, vinous, and malt liquors, or to frequent, loaf, or stand around said building within fifty feet thereof. (2) That it shall be unlawful for any saloon-keeper, or his clerk or employees to allow or permit any woman or women to come in or out of his building where spirituous, vinous, and malt liquors are sold or offered for sale, and it shall be the duty of said saloon-keeper, clerk or employees to immediately notify the officers that the first section of this ordinance has been violated, giving the name and color of the offender." These two sections are followed by section 3,

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which provides for the punishment of the proprietor if he violates section 2, and for the offender if she violates section 1. The Kentucky court, speaking through Mr. Justice Gaffy, disposes of the case in the following concise and forcible language: "It is contended for appellee that the sole object of the ordinance is to regulate and control the sale of liquors by reason of the fact that very disreputable, low and vile women congregate in and about saloons and places where liquor is sold, thereby causing affrays, fights, murder and other crimes. . . . It seems to us that the ordinance in question is unreasonable and an unnecessary interference with individual liberty, and tends to subject the vender of liquors as well as citizens to unreasonable prosecutions. If the ordinance only included the persons mentioned in appellee's brief, we are not prepared to say that it would be invalid. But it might be that very good women would, for proper and legal purposes, find it necessary to go into a building where liquors are sold, . . . and besides, we know of no rule which prohibits a well-behaved woman, for a lawful purpose, and in a lawful manner, from going into or near a saloon. It may be taken for granted that it is not often that such would be the case, but the ordinance in question makes no exceptions. If the citizens of Middlesboro choose to have saloons established where liquor is sold, it follows that all orderly and well-behaved persons have a right in an orderly manner, and for a lawful purpose, to visit such saloons." The judgment was reversed and the lower court directed to adjudge the ordinance in question invalid and unconstitutional. For the reason that this case is particularly applicable to the case at bar, we have quoted almost the entire opinion.

Counsel for respondent urges that the ordinance under consideration in the case above cited, after making it a misdemeanor for "a woman to go into a building where liquor was sold," went further, and provided that it was a misdemeanor also for a woman to "stand within fifty feet of such building." Counsel for respondent further say: "The last clause of this ordinance is an obviously unnecessary interference with personal liberty which finds no parallel in the ordinance in question in the case at bar." It is true that the ordinance in the

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Kentucky case does add the last clause as suggested by counsel, and that no such provision is contained in the ordinance under consideration, but it will be observed that the court in passing upon the provisions of the ordinance devoted nearly the entire opinion to a discussion of the clause that prohibited women from entering a building where intoxicating liquors were sold.

In *Re Ah Jow*, 29 Fed. 181, it is shown that the city of Modesto passed an ordinance, one section of which provided that "Every person who, in the city of Modesto, keeps or maintains any room or other place where opium, or any of its preparations is sold or given away, and every person who resorts to, frequents or visits such room or place is guilty of a misdemeanor; provided, that this section shall not apply to the sale or gift of any of the preparations of opium by any druggist for any ailment not caused by the use of opium or any of its preparations." The opinion, which is by Mr. Justice Sawyer, on this particular feature of the ordinance, says: "This language is extremely comprehensive and embraces every possible case of visiting such room or place, no matter whether for a proper and lawful or improper and unlawful purpose; whether the party has knowledge or is ignorant of the character of the room or place; whether he visits it innocently or otherwise; neither knowledge nor purpose of the visit is made an element of the offense. The mere fact of going there without any other element is made an offense."

In *Hechinger v. City of Maysville*, another Kentucky case by Mr. Justice Gaffy, reported in 22 Ky. Law Rep. 486, 57 S. W. 619, 49 L. R. A. 114, the ordinance provided: "That it shall be unlawful for any person or persons other than the husband, father, or brother or other male relative, to associate, escort, converse or loiter with any female known as a common prostitute, either by day or by night, upon any of the streets or alleys of the city of Maysville, and any person or persons other than the said husband, father, brother or other male relative, so offending shall, upon conviction thereof, before the police court in said city be fined." It is said in the opinion: "Manifestly, the ordinance was intended to accomplish a proper and

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laudable object, but it seems to us it is not properly guarded. . . . Any person should be allowed to converse with such female long enough to transact any necessary and legitimate business."

Mr. Dillon, in his work on *Municipal Corporations*, volume 1, fourth edition, section 322, in discussing the powers of municipal corporations to enact laws or ordinances for the punishment of crime, says: "As it would be unreasonable and unjust to make, under the same circumstances, an act done by one person penal and if done by another not so, ordinances which have this effect cannot be sustained. Special and unwarranted discrimination or unjust or oppressive interference in particular cases is not to be allowed. The powers vested in municipal corporations should, as far as practicable, be exercised by ordinances general in their nature and impartial in their operation." (See 1 Dillon on *Municipal Corporations*, 4th ed., sec. 325.)

In volume 21, *American and English Encyclopedia of Law*, 990, under the head of "Construction of Common Rights," this subject is discussed and the authorities of a large number of the states bearing on this question cited. Mr. McClain, in his work on *Criminal Law*, volume 1, section 65, in discussing the subject of reasonableness of ordinances, says: "An ordinance which the city passes in the exercise of the powers given it must be reasonable and the courts have authority to inquire into that question to a greater extent than they have with reference to state statutes," citing a number of authorities to support the text.

On the same subject we find the following language in volume 21, *American and English Encyclopedia of Law*, 985: "It is well established as a general rule that ordinances in order to be valid and binding must be reasonable and not arbitrary or oppressive, and ordinances which do not conform to this requirement will be declared void." Numerous cases are cited from many of the American states in support of this rule. In *Commonwealth v. Worcester*, 3 Pick. 462, it is said: "Whether a by-law be reasonable or not is for the court to determine."

For a very able and interesting discussion of the powers and duties of city authorities, as well as the courts in passing upon

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questions similar to the one before us, see *Helena v. Dwyer*, 64 Ark. 424, 62 Am. St. Rep. 206, 42 S. W. 1071, 39 L. R. A. 266.

In support of the contention that this ordinance should be sustained, counsel for respondent rely upon *Adams et al. v. Cronin*, reported in 29 Colo. 488, 69 Pac. 590, 63 L. R. A. 61. We have read this case with much interest and care and are in full accord with every principle of law enunciated. A careful examination of this case, however, discloses that a very different ordinance was before the Colorado court for determination to the one we are called upon to construe. Section 745 of the Denver ordinance provided: "Each and every liquor saloon, dramshop or tippling-house keeper . . . who shall have or keep in connection with or as part of such liquor saloon, dramshop or tippling-house, any winerom or other place either with or without door or doors, curtain or curtains, or screen of any kind, into which any female person shall be permitted to enter from the outside, or from such liquor saloon, dramshop or tippling-house, and there be supplied with any kind of liquor whatsoever, shall upon conviction be fined as hereinafter provided." Section 746 provides: "No person having charge or control of any liquor saloon . . . shall suffer or permit any female person to be or remain in such liquor saloon, dramshop, tippling-house or other place where intoxicating or malt liquors are sold or given away, for the purpose of their being supplied with any kind of liquor whatsoever . . . nor shall any female person be or remain in any dramshop, tippling-house, liquor saloon or place adjacent thereto or connected therewith and wait or attend on any person or solicit drinks in any such place." This ordinance was declared valid—and why not? No provision in the ordinance that an orderly, well-behaved woman might not enter any saloon in the city of Denver for the transaction of legitimate business and as often as she felt so disposed, so long as she did not visit such place for the purpose of being supplied with liquors or other immoral purposes. This ordinance falls strictly within the rule laid down in *Gastenuau v. Commonwealth*, *supra*, and indeed all the cases to which our attention has been called and heretofore referred to in this opinion. It was aimed at the very class of women who are usually termed the unfor-

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tunates of the human family, and was designed to discourage and prevent their presence in and around saloons, tippling-houses and wherever intoxicating liquors are sold. There is no attempt to prohibit a woman in the ordinary course of business to enter such places in the discharge of her business or for any legitimate reasons. The distinction between that ordinance and the one under consideration is easily drawn. The Denver ordinance prescribed a punishment for an offense that the proprietor must commit himself, whilst the Boise City ordinance provides a punishment for the proprietor if any woman enters his place unbeknown to him, without his consent and against his will, no matter what her motive or intent may be. There is no exception; the mere matter of entrance is the essence of the crime. There is no question about the power, and we may say the duty, of the city authorities to enact such ordinances as will promote morals and regulate the sale of intoxicating liquors in such a way as to prohibit immoral women from frequenting such places for the purpose of drinking, engaging in games, soliciting trade, or any other immoral purpose, but to say by an ordinance that a wife or mother may not enter a saloon without subjecting herself to a fine (as well as the proprietor) in search of a recreant husband or a wayward son, is beyond the legal power of the city. So long as the state and the city of Boise see fit to license the retail sale of liquors, so long must they protect parties lawfully engaged in that business in a reasonable way.

The judgment is reversed and cause remanded for further proceedings consistent with this opinion.

Ailshie, J., and Sullivan, J., concur.

Argument for Defendant.

(January 16, 1905.)

ACKLEY v. PERRIN.

[79 Pac. 192.]

BOARD OF STATE PRISON COMMISSIONERS—ACTION BY MAJORITY OF MEMBERS—NOTICE OF MEETING.

1. The board of state prison commissioners as created by section 5 of article 10 of the constitution is granted the "control, direction and management of the penitentiaries of the state," and under such grant of power and authority they may meet at such times as they deem necessary.

2. A majority of the officers constituting such board may hold a meeting and transact such business as the board is authorized to transact.

3. A meeting of the state prison commissioners can be lawfully held by a majority of the board without giving notice to a member of the board who is at the time of calling and holding the meeting beyond the jurisdiction of the state.

(Syllabus by the court.)

ORIGINAL application by D. W. Ackley, warden of the state penitentiary, to compel the defendant to deliver to plaintiff possession of the state penitentiary, together with the inmates thereof, the keys, books and property belonging thereto. Writ granted.

John A. Bagley, Attorney General, and Wood & Wilson, for Petitioner, file no brief.

Henry Z. Johnson, Charles S. Kingsley and A. A. Fraser, for Defendant.

This is a proceeding to determine the right to exercise the office of warden of the state penitentiary. Under the statute the warden shall be appointed by the board of state prison commissioners and holds his office during the pleasure of the board. (First Sess. Laws, p. 22, sec. 4.) This board under the constitution, article 4, section 18, is composed of the governor, Secretary of State and attorney general, of which board the governor is chairman. (Second Sess. Laws, p. 155,

Argument for Defendant.

amending First Sess. Laws, p. 22, sec. 2.) There is no provision of the statute that in the absence of one member a majority thereof may act. Whatever power, therefore, was conferred by the legislature was conferred upon the three persons named as a body, and to them, as such, was delegated whatever power was given. Whatever action, therefore, they take, must be taken by them as a board. In other words, they act as an entirety. And should a majority assume to do the business of the board in the absence of the other members, their action would not be good under all of the decisions, unless the majority were, by the terms of the statute from which they derived their power, expressly authorized to act. (*Schwanbeck v. People*, 15 Colo. 64, 24 Pac. 575, 576.) In this connection it is significant that the board of state prison commissioners is the only state board that the legislature has not seen fit to delegate authority to a majority thereof to act. In the cases of the board of pardons, the board of equalization, the board of examiners, the board of land commissioners, the board of regents, the boards of trustees of the normal schools, and the soldiers' home, and, lastly, the boards of county commissioners, a majority are expressly authorized to act. Again, the statute prescribes that the board of prison commissioners shall meet quarterly; and when in special session the time and business thereof. At no other time can this board meet under the authorities, unless all are voluntarily present, or if a majority are present, that notice has been served on the absent member, or at least an attempt has been made to serve him with notice of the proposed meeting. Especially is this true when the board attempts to meet at a time other than the time prescribed for meeting by the statute. (*People v. Carver*, 5 Colo. App. 156, 38 Pac. 334.) The record in this case shows affirmatively that the meeting herein was at a time other than prescribed by statute and that no notice was given, or honest or reasonable effort made to give notice to the absent member. The record also shows that the meeting was not an adjourned meeting of a regular meeting. That being so, it follows as a necessary result that their acts which they assumed to perform were unauthorized and void. (*Jackson v. Collins*, 41 N. Y. St. Rep. 590, 16 N. Y. Supp. 651, 653; *In re*

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Bradley, 49 N. Y. St. Rep. 530, 21 N. Y. Supp. 167; *School Dist. v. Bennett*, 52 Ark. 511, 13 S. W. 132, 133, adhered to in *Burns v. Thompson*, 64 Ark. 489, 43 S. W. 499; also, *School Dist. No. 49 v. Adams*, 69 Ark. 159, 61 S. W. 794; *Dunn v. Sharpe*, 4 Idaho, 98, 35 Pac. 842; *Conger v. Board of Commrs.*, 4 Idaho, 740, 48 S. W. 1064; *People v. Parker*, 3 Neb. 409, 19 Am. Rep. 634-637; *State v. Graham*, 26 La. Ann. 568, 21 Am. Rep. 551.)

AILSHIE, J.—This is an application for a writ of mandate to C. S. Perrin to compel him to deliver up the possession of the Idaho state penitentiary, together with the inmates thereof, the keys, books, moneys and property thereunto belonging to the plaintiff, Ackley. The application is based on the proceedings of the board of state prison commissioners had on the twenty-first day of November, 1904. A copy of the record of their proceedings is attached to the petition. The answer of the defendant puts in issue the regularity and legality of the meeting so held and the proceedings had thereat. It admits that the proceedings referred to in the complaint were had, but denies that the action taken by the attorney general and Secretary of State were acts of the state prison board, or that they constituted such board at the time and in the manner they assumed to act. This matter is presented on a motion for judgment on the pleadings. It is conceded that if the proceedings were the proceedings of the board of state prison commissioners, that the removal of the warden was legal. It is unnecessary for us to go into a detailed statement of the contentions of both parties.

By section 5, article 10 of the state constitution, the governor, Secretary of State and attorney general are constituted a board to be known as the state prison commissioners, and are given "the control, direction and management of the penitentiaries of the state." It also provides that "the governor shall be chairman and the board shall appoint a warden who may be removed at pleasure." It will thus be seen that the constitution confers on this board the management and control of the state penitentiary. That being true, the legislature has not the power to

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take from that board the management and control of that institution, or make any rules and regulations for the government of the board that would in any way interfere with the efficient management and control of that institution. The authority to legislate in aid of the full and complete exercise of this power is clearly recognized by section 18 of article 4 of the constitution, but the right conferred upon the legislature by this section cannot be employed to diminish or abridge any of the powers conferred by section 5 of article 10.

The only question presented by the pleadings for our consideration is whether or not the action of the Secretary of State and attorney general had at the time and in the manner they are shown by the pleadings to have acted is in law the legal action of the board of state prison commissioners. Article 10 of the constitution is dealing with "Public Institutions," and while section 5 makes no provision as to the time of meeting nor the manner of calling meetings, nor the manner of exercising the "control, direction and management" delegated to them, it is significant that section 6, immediately following this provision, provides for directors of the insane asylum, and in prescribing the powers of that board uses the same language, namely, that they shall have the "control, direction and management of the asylum," and concludes the sentence with the provision that it shall be exercised under such regulations as the state legislature may provide. This provision following immediately after the creation and granting of authority to the board of state prison commissioners implies to my mind that the framers of the constitution did not mean to authorize the legislature to in any way abridge or curtail the exercise of any of the powers granted to the board of state prison commissioners. The first legislature that convened after the adoption of the constitution, by act of February 3, 1891, enumerated a large number of duties to be performed by the prison board, and in the same act, by section 6 thereof, provided that the board should hold quarterly meetings but nowhere in the act did they specify any date on which meetings should be held. It is true that by section 13 of that act certain things are required to be done by the board on the first

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Monday in December, and presumably at a meeting, but a meeting as such is not mentioned. This act enumerates duties to be performed which of necessity require that meetings be held much oftener than quarterly, and it is our opinion that the legislature in requiring quarterly meetings to be held by the board had no intention or purpose of limiting the power of the board to these meetings only. The board of state prison commissioners is a board created by the constitution and selected by the people every two years. They are responsible to no appointive power, but are accountable directly to the people, and it seems to us that this is one of the controlling reasons why the framers of the constitution left the exercise of the powers granted to this board to their judgment and discretion. While the legislature have the undoubted right to point out a method of exercising these powers and impose special duties upon them, we are satisfied that the legislative department of the government would have no power or authority to limit or in any way interfere with the full and complete exercise of the powers and duties conferred by the constitution, and we do not think they have attempted to do so. This phase of the question is, however, not a serious matter in this case, for the reason that it is admitted by counsel for the defendant that under certain conditions the board might meet at any time.

It is contended, however, that the full membership of the board should be present, or notice thereof should be given. The serious question, to our minds, is as to the manner of calling these meetings and whether or not notice should be given. Neither the framers of the constitution nor the legislature have seen fit to make any provision for the time of holding meetings, nor the method nor manner of calling them. They have required no notice, and the question arises as to whether or not the court can, by construction or otherwise, require the giving of a notice; and if so, what kind of notice shall be given; and what shall be the manner of service and the time intervening between the service and the meeting—and a host of other such questions would necessarily arise. As to the propriety and wisdom of all the members of the board being notified of meetings, and having an opportunity to attend, there can be no question, but as to the right of the courts to interfere with

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the exercise of the judgment of the board or attempt to control their meetings or prescribe a method and manner of convening them, there is most serious doubt.

It appears to me that it was the intention of the framers of the constitution to grant exclusive power to this board in all these matters, and with the exercise of that power within the scope of their duties, the courts cannot interfere. The members of the board are accountable to the people, and if they exercise these powers unwisely the people will call them to account. It is true there may be special instances where it will result in working a great hardship, and possibly an injustice, on some person or persons, but that is one of the consequences of the service and is a risk which must necessarily be assumed by those who undertake the service.

If we should require notice, then by analogy it might be such notice as is required in other similar matters under the statute; this might be done when the members of the board are within the state, but we would still be without a means of service of notice upon a member beyond the jurisdiction of the state. I am of the opinion that in such case the court is powerless to require notice of any kind. If I could find authority for the requirement I should be very much inclined to hold that notice should be given. The authorities cited do not cover this case for the reason that in all those cases the boards whose actions were questioned were creatures of the legislature, and their meetings and methods of acting were prescribed by statute.

Section 14 of the Revised Statutes provides that wherever joint authority is given to three or more public officers or other persons to act, that the same shall be construed as giving such authority to the majority of them, unless it is otherwise expressed in the act giving the authority. This statute, it may be justly said, does not eliminate the question of notice where the constitution or statute requires such, but it is strong evidence of the legislative intent to authorize a majority of all boards deriving their powers from the legislature to act in every matter over which they have authority, unless otherwise expressed by statute. It would seem that this authority might

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extend to the determination as to the manner and method of calling or holding a meeting where such question has not been settled by law. We hold that a meeting of the state prison commissioners can be lawfully held by a majority of the board without giving notice to a member who is at the time of calling and holding the meeting beyond the borders of the state. It is conceded by all parties to the action that if the meeting of November 21, 1904, was a legal and lawful meeting of the state board of prison commissioners, they could remove the warden at pleasure and without assigning any reason, and appoint his successor. These things were done—the defendant was removed as warden and the office declared vacant, and the petitioner was appointed to fill the vacancy.

It follows from what has been said that a peremptory writ of mandate should issue as prayed for, and it is so ordered. Writ issued. No costs awarded.

Sullivan, C. J., concurs.

STOCKSLAGER, J., Dissenting.—I do not question the power of the board of prison commissioners to remove the warden of the penitentiary at a regular meeting of such board.

I also think it is beyond dispute that a majority of the board may remove the warden at either a regular or special meeting. The only serious question presented to us is the power of the Secretary of State and the attorney general to act in the absence of the governor, who is by law the president of the board, in the absence of any showing that an effort of any kind had been made to procure his presence. It is shown that the president of the board was absent from the state, but there is an entire failure to show that any means were resorted to to notify him of the intended meeting and that his presence was desired. If there had been a showing that an effort had been made to locate the governor and procure his presence, and that all efforts had failed, I think it would be sufficient to warrant the action of the majority of the board to meet and transact such business as seemed a pressing necessity. So far as the sufficiency of the notice is concerned, I am of the opinion that a telegram, a letter or a personal notice by telephone inform-

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ing him of the urgent necessity of a meeting of the board, giving him sufficient time to reach the place designated as the meeting place of the board, would be sufficient in law. In other words, if it were shown that the president of the board had been given an opportunity to be present, and refused or neglected to attend the meeting, all parties interested would be estopped from complaining of the action of the majority of the board. I am not without authority in insisting that the majority of the board could not legally act without an effort to have the third member present. In *School Dist. No. 42 v. Bennett*, 52 Ark. 511, 13 S. W. 132, the principle under consideration here is discussed. It is said: "The public select each member of the board of directors, and is entitled to his services. This it cannot enjoy if two members can bind it without receiving, or even suffering, the counsel of the other. Two could if they differed with the third, overrule his judgment, and act without regarding it; but he might, by his knowledge and reason, change the bent of their minds, and the opportunity must be given him. We conclude that two directors may bind the district by a contract made at a meeting at which the third was present, or of which he had notice; but no contract can be made except at a meeting, and no meeting can be held unless all are present, or unless the absent member had notice."

To the same effect, see *Burns v. Thompson*, 64 Ark. 489, 43 S. W. 499; *School Dist. No. 49, Falkner Co. v. Adams*, 69 Ark. 159, 61 S. W. 793; *Jackson v. Collins*, 41 N. Y. St. Rep. 590, 16 N. Y. Supp. 651-653.

A very interesting and instructive case is reported in 5 Colo. App. 156, 38 Pac. 332, entitled *People v. Carver*. The action was for the purpose of trying the title to the office of general road overseer of Douglass county. The statute provides for the division by the board of county commissioners of their counties into suitable road districts as in their judgment will best subserve the interests of the people, and that at their January meeting shall by resolution appoint a general road overseer for the county who may be removed by the board for reason satisfactory to them. It seems the relator was removed by two members of the board. It is said two of the commis-

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sioners after the organization assumed to hold a meeting at which the third was not present, and of which he had no knowledge, and adopted a resolution removing the relator and appointing the defendant. This action cannot be upheld. It was clearly without authority of law. The removal and appointment were both illegal. The Colorado court goes to the extent of holding that an officer cannot be removed at a special meeting, unless all members are present. The language of the opinion is as follows: "But as the statute does not confer upon any one member the authority to call such meeting, and as it belongs to the board alone to judge of the propriety of holding it, and their judgment can be expressed only after they come together, to make the meeting one at which such expression can be given, all the members must be present."

The case of *Schwauback, Auditor, v. Smith*, reported in 15 Colo. 64, 24 Pac. 575, holds to the same rule.

In *Schuerman v. Territory of Arizona*, 184 U. S. 342, pp. 353, 354, 22 Sup. Ct. Rep. 406, 46 L. ed. 580, an opinion by Mr. Justice Peckham on appeal from the supreme court of Arizona Territory, we find a similar question discussed. It is shown that a board known under the territorial statute as the "Loan Commissioners of the Territory of Arizona," consisting of the governor, auditor and secretary of the territory, should constitute such board. It seems that two members of this board funded certain bonds of the territory during the absence from the territory of the third member. Mr. Justice Peckham says: "The record does not show that the absent commissioner had not been notified to attend the meeting at which the bonds were funded. It is not to be presumed that notice of the intended meeting was not given. Under the provisions of the territorial act the proceedings of the board of loan commissioners were legal." It will be observed that under the territorial statute creating this board, subdivision 2 of section 2932 provides for action by a majority of three or more public officers to whom a joint authority is given. In my opinion the peremptory writ of mandate should have been denied.

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(January 18, 1905.)

IN RE SHIRLEY JAY.

[79 Pac. 202.]

**HABEAS CORPUS—DISCHARGE OF PRISONER—FILING INFORMATION—
LOSS OF COMPLAINT—PRESS OF BUSINESS—PRELIMINARY EXAMINATION.**

1. Under the provisions of section 8112, Revised Statutes, the court, unless good cause to the contrary is shown, must order the prosecution dismissed when a person has been held to answer for a public offense where an indictment or information is not found or filed against him at the next term of said court at which term he is held to answer.

2. That the complaint filed with the committing magistrate had been lost and the information of the loss not communicated to the prosecuting attorney until about two weeks before the beginning of the term of court, and press of business on the part of the prosecuting attorney is not a "good cause to the contrary" within the meaning of that term as used in said section.

3. Where the complaint filed by the committing magistrate has been lost, it is not necessary to hold another preliminary examination before an information can be legally filed, and especially is that true where the defendant waived a preliminary examination.

(Syllabus by the court.)

ORIGINAL application for writ of *habeas corpus*. Granted.

Elder & Whitla, for Petitioner, file no brief.

Thomas H. Wilson, for the State, files no brief.

SULLIVAN, J.—This is an application for a writ of *habeas corpus*. The petition of the applicant shows that on the nineteenth day of April, 1904, the petitioner was committed to the custody of the sheriff of Kootenai county and held to answer to the charge of perjury, and his bail fixed at the sum of \$5,000, which he was unable to give, and has been confined and restrained of his liberty since said date by the sheriff of Kootenai county; that the first term of the district court in and for said county after the commitment of the petitioner, was com-

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menced on the tenth day of November, 1904, and adjourned of the twelfth day of December, 1904; that no indictment was found and no information was filed in said court against said petitioner charging him with any crime whatever. It appears from the return to said writ filed by the county attorney of said county, that about two weeks prior to the commencement of said term of court he learned that the complaint filed in the justice's court against said defendant charging him with said crime had been lost or mislaid, and that he has been unable to find it, and for that reason, and on account of press of business, the county attorney has been unable to hold another preliminary examination and prepare and file an information during said term of said court. Section 8112, Revised Statutes, provides that the court, unless good cause to the contrary is shown, must order the prosecution or indictment to be dismissed in the following cases: 1. "When a person has been held to answer for a public offense if an indictment is not found against him at the next term of court at which he is held to answer." It is admitted that no information was filed against the petitioner at the next term of court following his commitment, but it is contended that the cause above stated, to wit, the loss of the complaint and want of time to hold a preliminary examination, is a sufficient cause to hold the defendant to answer at the next term of court. We cannot concede that contention. The defendant had been charged with a felony, and had been confined in jail from the nineteenth day of April, 1904, until after the twelfth day of December, of the same year; and during that time the district court of that county had held a term of court and had been in session for about thirty days, and we do not think the cause shown is sufficient to warrant the holding of the defendant in jail until the next term of said court.

It has been suggested that as the complaint filed before the committing magistrate had been lost, that it was necessary to hold another preliminary examination before an information could regularly be filed. There is nothing in that contention. In this case the defendant waived a preliminary examination and it was not necessary to hold a preliminary examination on

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account of the loss of the complaint filed with the committing magistrate.

The defendant is therefore discharged.

Stockslager, C. J., and Ailshie, J., concur.

(January 18, 1905.)

IN RE CARL SEARLES, PETITIONER.

[79 Pac. 1132.]

ORIGINAL application for a writ of *habeas corpus*.

Elder & Whitla, for Petitioner, file no brief.

Thomas H. Wilson, Prosecuting Attorney, for the State, files no brief.

SULLIVAN, J.—This is an original application for a writ of *habeas corpus*, and the facts are substantially the same as in the case of *In re Shirley Jay*, *ante*, p. 540, 79 Pac. 202, and on the authority of that case the prisoner must be discharged.

Stockslager, C. J., and Ailshie, J., concur.

(January 20, 1905.)

SPENCER v. MORGAN.

[79 Pac. 459.]

CONSTITUTIONAL LAW—TWO-MILE LIMIT LAW—HERDING AND GRAZING SHEEP—DAMAGES—ELEMENT OF—CONFLICT IN EVIDENCE.

1. The construction placed on sections 1210 and 1211, Revised Statutes, in the cases of *Sifers v. Johnson*, 7 Idaho, 798, 97 Am. St. Rep. 271, 65 Pac. 709, 54 L. R. A. 795, and *Sweet v. Ballentine*, 8 Idaho, 431, 69 Pac. 995, holding the provisions of said sections constitutional is the settled law of this state.

Argument for Respondent.

2. The keeping of livestock is under the police regulation of the state, and such police regulation extends over the public lands of the United States within the state.

3. Under the provisions of section 1320, Revised Statutes, the land owner is not required to fence against sheep or swine.

4. Where there is a substantial conflict in the evidence the verdict and judgment will not be reversed.

APPEAL from the District Court of Owyhee County. Honorable George H. Stewart, Judge.

Action to recover damages for the herding and grazing of sheep under the provisions of sections 1210 and 1211, Revised Statutes. Judgment for plaintiff. Affirmed.

J. F. Nugent and S. H. Hays, for Appellant.

There is an implied license given by the United States to all owners of stock to graze them upon the public lands. (*Burford v. Houtz*, 133 U. S. 320, 10 Sup. Ct. Rep. 305, 33 L. ed. 618.) In this case it appears that the dwelling-house was out of the sight of the herder, who was not nearer to it than a mile and a tenth; that he did not know he was within the limit and would have stayed out had he known where the limit was. He had received orders from the owner to move to another locality and was actually moving when notified that he was within the limit. It is still the duty of the farmer to fence against sheep. (Rev. Stats., sec. 1320; *Knight v. Abert*, 6 Pa. St. 472, 47 Am. Dec. 478.) It was the duty of the plaintiff to make reasonable efforts to prevent the damages suffered, and there can be no recovery of such damages as might have been so prevented. (8 Am. & Eng. Ency. of Law, 2d ed., 605, 690.) The line of plaintiff's two-mile limit could have been indicated at an expense of about \$10. It was the duty of the plaintiff to make a reasonable expenditure to avoid damage. (8 Am. & Eng. Ency. of Law, 2d ed., 606.)

E. Nugent and Perky & Blaine, for Respondent.

The provisions of our law questioned by this appeal have been sustained by repeated decisions of this court as a proper exercise of the police power. It would be difficult to find a ques-

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tion in all the litigation of this court more definitely settled in our jurisprudence. In the distribution of the governmental powers under the federal constitution, the bulk of the police power remains with the states. The framers of the constitution of the United States proceeded upon the principle that the restrictive control and care of social and economic interests should be left with the member states except where diversity of regulation would be an impediment to national development. (Freund on Police Powers, sec. 64.) The common-law rule that a man must confine his domestic animals to his own inclosure has never obtained in this state. (*Johnson v. Oregon Short Line R. Co.*, 7 Idaho, 355, 63 Pac. 112, 53 L. R. A. 744, decided December 5, 1900.) The law under consideration excluding sheep from a portion of the range and to that extent modifying the doctrine of *Johnson v. Oregon Short Line R. Co.*, *supra*, was upheld by this court June 21, 1901. (*Sifers v. Johnson*, 7 Idaho, 798, 97 Am. St. Rep. 271, 65 Pac. 709, 54 L. R. A. 785, the doctrine of which decision has been upheld by repeated decisions since.) As generally sustaining the right of the legislature to modify or abrogate the common-law rule, and that range rights are a proper subject of state legislation, see 2 Cyclopedia, 393-396. Statutes regulating range rights and fence laws may discriminate against sheep. (*French v. Cresswell*, 13 Or. 418, 11 Pac. 62.) The common law can be re-enacted as to a particular kind of stock. (*Wells v. Beal*, 9 Kan. 597.) This court has held that a violation of section 1210, Revised Statutes, is a nuisance, and that the liability for damages is in the nature of a penalty. The court has further expressly held that the settler has an ownership, in common with others, in the grass within "the two-mile limit," and that such ownership is exclusive as against the owners and herders of sheep. (*Sweet v. Ballentyne*, 8 Idaho, 431, 69 Pac. 995.)

SULLIVAN, J.—This action was brought by the respondent as plaintiff in the probate court of Owyhee county, on December 8, 1902. From a judgment in favor of the plaintiff in that court an appeal was taken to the district court. On a trial in that court verdict and judgment were rendered and en-

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tered in favor of the plaintiff, and a motion for a new trial was overruled. The suit was brought to recover damages alleged to have been sustained by reason of the appellants herding and grazing their sheep within two miles of the residence of the plaintiff, and was brought under the provisions of the law commonly known as the "two-mile limit law," as embodied in sections 1210 and 1211 of the Revised Statutes. On the verdict of a jury judgment was rendered in favor of the respondent for \$299 and costs of suit. The appeal is from the judgment and order denying a new trial. It is conceded that the land upon which appellants grazed and herded their sheep is unoccupied and unappropriated public land of the United States.

It is first contended that said law is unconstitutional, for the reason that it is in violation of the fourteenth amendment to the constitution of the United States, in that it denies to appellants the equal protection of the law and deprives them of their property without due process of law; that there is an implied license given by the United States to all owners of stock to graze them upon the public lands.

The constitutionality of the provisions of said sections 1210 and 1211 has been passed upon by this court in *Sifers v. Johnson*, 7 Idaho, 798, 97 Am. St. Rep. 271, 65 Pac. 709, 54 L. R. A. 785, *Sweet v. Ballentine*, 8 Idaho, 431, 69 Pac. 995, *Phipps v. Grover*, 9 Idaho, 415, 75 Pac. 64, and *Walling v. Bown*, 9 Idaho, 184, 76 Pac. 318. In those cases it was held that the provisions of said sections were within the reasonable police powers of the state and not repugnant to the provisions of the fourteenth amendment of the federal constitution or to any of the provisions of the constitution of this state. In support of that contention appellants cite *Buford v. Houtz*, 133 U. S. 320, 10 Sup. Ct. Rep. 305, 33 L. ed. 320, which it is claimed holds that the implied license given by the United States to all classes of stock to graze upon the public lands is a property right which the state cannot take away, and that such license has been extended to stock of every description, and that the state cannot confine it to a particular class or within special limits. That case was from the then territory of Utah, and decided under the laws of that territory,

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now state. It is there held that the rule of the common law, to wit, that the owner of domestic animals was liable for trespass of such animals upon the uninclosed land of his neighbor has never prevailed in that state. By the statute law of that territory, domestic animals, when not dangerous, were permitted to run at large without responsibility for their getting upon such lands, and the decision of *Buford v. Houtz* was rendered with that statute in view. In this state the running of hogs at large is prohibited and the herding and grazing of sheep is prohibited within two miles of an inhabited dwelling. The decision in the case of *Buford v. Houtz, supra*, is commented upon and quoted at considerable length in *Northern Pac. Ry. Co. v. Cunningham*, 89 Fed. 594. The court there said: "The case of *Buford v. Houtz*, 133 U. S. 320-332, 10 Sup. Ct. Rep. 307, 33 L. ed. 320, upon which the defendant relies, would be conclusive in his favor upon this hearing, if the local law upon which that decision rests prevailed in this state. In the opinion by Mr. Justice Miller, the supreme court is careful to make it clear that in Utah, where the case arose, the rule of the common law, that the owner of domestic animals should be liable for their trespassing upon uninclosed land of his neighbor, does not prevail, but, on the contrary, his right to permit them, when not dangerous, to run at large, without responsibility for their getting upon such land of his neighbor is a part of the statute law." It was not intended by the decision in *Buford v. Houtz*, or of any other decision of the supreme court of the United States which we have examined, to prohibit a state from enacting reasonable police regulations as to the keeping of livestock within the state and extending such regulations over livestock that may be herded or grazed on the public domain within the state.

Tiedeman, in his work on State and Federal Control of Persons and Property, at page 838, says: "In every state the keeping of livestock is under police regulation. . . . The clash of interest between stockraising and farming calls for the interference of the state by the institution of police regulations; and whether the regulations shall subordinate the stockraising interest to that of farming, or *vice versa*, in the case of an ir-

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reconcilable difference, as is the case with respect to the going at large of cattle, is a matter for the legislative discretion, and is not a judicial question. In the exercise of this general power of control over the keeping of livestock, the state or municipal corporation may prohibit altogether the running at large of such animals, and compel the owners to keep them within their own inclosures."

The views of this court on the constitutionality of said sections 1210 and 1211 are quite fully set forth in decisions of this court above cited, and we hereby affirm the views therein expressed. Under the provisions of said sections the penalty prescribed is the damage sustained by the injured party, and as to an element of damages this court said in *Sweet v. Ballentine*, 8 Idaho, 431, 69 Pac. 1002: "The giving of damages for the destruction of grasses on the public domain, by sheep within two miles of the dwelling of the settler, is not based upon the idea that the settler has a vested property right in such grasses. The settler is permitted, under the law, to recover such damages as a penalty against the petitioner because the latter has done that which the law forbids and makes unlawful. And said statute was not framed on the idea that the settler had a vested right in the grasses growing on the public domain, but on the theory that one who violated said law should pay as a penalty for his unlawful act all damages that a settler had sustained by reason of such violation." And I think the actual damage sustained by the settler by reason of the destruction of the grasses within the two-mile limit is a proper element of damages in this class of cases.

It is contended that it is the duty of the farmer to fence against sheep under the provision of section 1320, Revised Statutes. Said section is as follows: "Any person having any inclosure in conformity with the provisions of chapter 1 of this title is deemed to possess a lawful inclosure, and if any horses, mules, jacks, jennies, cattle, hogs or sheep break into such inclosure, the attorney or party injured has a lien upon such animals until he is recompensed for all damages committed by said animals; provided, that persons owning or occupying any lands which are inclosed by any watercourse or natural em-

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bankment, or hill, or any cliff or rocks, may have the same examined by viewers as is provided in this chapter, and if such appraisers report the same a sufficient inclosure, it must be deemed a lawful inclosure.”

Chapter 1 of the title, as amended, provides what shall constitute a lawful fence, and it is obvious if a wire fence be so constructed as to constitute a lawful fence it *would turn neither hogs nor sheep*.

The question of contributory negligence on the part of the respondent is raised on the ground that he failed to post notices of the two-mile limit line around his residence. There is no merit in this contention. Another contention is that the damages awarded are excessive. There is a conflict in the evidence upon that point, the plaintiff estimating his damages from \$200 to \$500, and the respondent, Reynolds, estimated the damages at about \$45. There being a substantial conflict in the evidence on this point, this court is not inclined to disturb the verdict and judgment. The judgment is affirmed with costs in favor of the respondent.

AILSHIE, J., Concurring.—I have heretofore, in *Walling v. Bown*, 9 Idaho, 184, 76 Pac. 318, expressed the opinion that the question as to the constitutionality of sections 1210 and 1211, Revised Statutes, is a subject no longer open to judicial consideration and determination in this state. In concluding that opinion I said: “The writer of this opinion is of the belief that, whatever might be our judgment now, we would be wholly unjustified in opening these questions for further consideration by this court.” I have in no respect changed my mind on this phase of the case since the Walling-Bown opinion was announced; and, indeed, I think the reasons even stronger now than they were then for applying the principles of *stare decisis* to the question there considered.

Upon the point that the damage allowed in this case is excessive, I have examined the evidence and find such a conflict as will prevent this court from disturbing the judgment. For the foregoing reasons I concur in affirming the judgment.

Points decided.

STOCKSLAGER, C. J., Dissenting.—For the reasons expressed in *Sweet v. Ballentine*, 8 Idaho, 431, 69 Pac. 995, I cannot concur in the conclusion reached by Mr. Justice Sullivan, and for the reasons expressed in *Walling v. Bown*, 9 Idaho, 184, 76 Pac. 318, I cannot concur in the concurring conclusion reached by Mr. Justice Ailshie.

(January 23, 1904.)

CUNNINGHAM v. STONER.

[79 Pac. 228.]

APPEAL—INSUFFICIENCY OF EVIDENCE—FINDINGS—JUDGMENT—CLAIM AND DELIVERY—DECEASED PERSON—CLAIM AGAINST—PLAINTIFF AS A WITNESS—DAMAGES—MEASURE OF.

1. Under the provisions of section 4807, Revised Statutes, unless an appeal is taken within sixty days after the entry of judgment, this court is precluded from reviewing the evidence to ascertain whether it is sufficient to support the findings or judgment.

2. In an action in claim and delivery the main issue is the right to the possession of the personal property in dispute.

3. As this is not an action prosecuted against an executor or administrator upon a claim or demand against the estate of a deceased person, the plaintiff is not precluded from testifying as a witness in his own behalf under the provisions of subdivision 3, section 5957, Revised Statutes.

4. The measure of damages in this case, if the respondent finally recovers the sheep and their increase, or their value, and the value of the wool shorn from the sheep, is that the appellant would be entitled, as an offset thereto, to the reasonable cost of shearing the sheep while they were in his possession and marketing the wool; but would not be entitled to the cost of keeping the sheep except from the date of the judgment of the court below until the termination of the retrial of the case after this decision.

(Syllabus by the court.)

APPEAL from District Court of Bingham County. Honorable James M. Stevens, Judge.

Action in claim and delivery to recover a band of sheep. Judgment for defendants. Reversed.

Argument for Appellant.

J. L. Rawlins, for Appellant.

There is no conflict of evidence in this case and the evidence, without contradiction, establishes the following facts: On January 29, 1896, plaintiff being the owner, by purchase, of a flock of three thousand ewes, one or two years old, leased them to James H. Day, until October 1, 1897, to be returned at that time, any losses to be made good out of the average of the lambs of said ewes. The lessee, or bailee, was also to pay for the use of said sheep, nine lambs on the one hundred, for each year, and one and one-half or two pounds of wool, per head. At the trial the following statement and admission were made: "Mr. Rawlins.—In the spring of 1899 the terms of the agreement between the plaintiff, James A. Cunningham, and James H. Day, deceased, as embodied in exhibit 'D' were modified by agreement of said parties to the extent that in lieu of the nine lambs and wool to be paid by James H. Day to the plaintiff for the use of said sheep for each year that said Day was to pay an annual cash rental for the use of said sheep in the sum of eighteen hundred dollars. Mr. Rogers.—We are prepared to accept counsel's statement of that fact as correct." Under the original lease as thus modified the sheep were held by Day until his death, about April 14, 1903, he paying the stipulated annual cash rental for their use, as hereinbefore stated. At the time the modified lease was made and went into effect the number of sheep to which the plaintiff was entitled was three thousand ewes, and at the rate of nine lambs on the one hundred for each of the years, 1896, 1897, 1898 and 1899. On October 1, 1897, the three thousand, plus lambs, five hundred and forty head, made the total to which plaintiff was entitled—three thousand five hundred and forty head of sheep. On October 1, 1898, plaintiff was entitled to three thousand five hundred and forty head, plus three hundred and nineteen, or the total of three thousand eight hundred and fifty-nine head. On October 1, 1899, plaintiff was entitled to three thousand eight hundred and fifty-nine head, plus three hundred and twenty-nine head, or the total of four thousand one hundred and eighty-eight head of sheep. Notwithstanding the foregoing were the facts, the court below, as a conclusion of fact and law, found that plain-

Argument for Appellant.

tiff was not the owner or entitled to the possession of the sheep, and that the same belonged to the estate of James H. Day and had been his property prior to his death. When and how did the sheep cease to be the property of the plaintiff and become the property of Day? Certainly, plaintiff was the owner of the flock of three thousand ewes. Day took these as bailee, agreeing to return the identical ewes, making good losses from the "average of the lambs of said ewes," and to pay for the use of said ewes at the rate of nine lambs per one hundred and one and one-half or two pounds of wool to the head each year. Some of the original ewes remained in the flock at the commencement of this action, and the rest of the flock consisted of their increase, except the bucks and the few Oregon sheep. "It is elementary that the owner of the dam, in the absence of any valid stipulation or arrangement to the contrary, owns her young from the moment of birth." (*Leavitt v. Jones*, 54 Vt. 423, 41 Am. Rep. 849, 851; *Arkansas Valley Land Co. v. Mann*, 130 U. S. 69, 78, 9 Sup. Ct. Rep. 458, 32 L. ed. 854, 2 Cyc. of Law & Pr. 309-311.) The following cases, almost completely analogous to the case at bar, establish plaintiff's right of recovery: *Turnbow v. Beckstead*, 25 Utah, 468, 71 Pac. 1062; *Woodward v. Edmunds*, 20 Utah, 118, 57 Pac. 848; *Robinson v. Haas*, 40 Cal. 475; *Bellows v. Denison*, 9 N. H. 293; and see *Solomon v. Franklin*, 7 Idaho, 316, 62 Pac. 1030. That the defendants Stoner and Post stand in no better position than Day is well established. The rule is stated succinctly in the following language: "Bailee cannot, in contravention of the purpose of bailment, sell, pledge, mortgage, exchange or give away the property or otherwise expressly or impliedly transfer it so as to give title even to one acting *bona fide*, and without notice of the bailee's status." (5 Cyc. of Law & Pr. 188; *Bache v. Clarke*, 13 L. R. A. 717, note.) The mortgages by Day to the Flato Commission Company did not come to the knowledge of the plaintiff until after Day's death. This act on the part of Day was inconsistent with the bailment, and the bailment was thereby terminated, giving plaintiff the right to the immediate possession of the sheep. (5 Cyc. of Law & Pr. 205, and authorities there cited.) The court erred in holding that plaintiff was

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incompetent to testify to any fact occurring before the death of James H. Day. This ruling was based upon the third subdivision, section 5957, Revised Statutes. It will be noted that plaintiff in this case was not a party or the assignor of a party in an action against an administrator, upon any claim or demand against an estate. The action by plaintiff was against the defendants, Stoner and Post, and was based solely upon a claim or demand made against these defendants. In respect to this claim the administrator of the estate of James H. Day was not a necessary party. Upon the issue thus presented no judgment could be rendered against the estate, or to charge a trust upon any property belonging to the estate. The admission in evidence of the declaration of Day, in the absence of the plaintiff, that he, Day, was the owner of the sheep, was manifest error. The declarations were made in Salt Lake City while the sheep were in Idaho or Wyoming. They did not accompany or tend to characterize any act of Day pertaining to the possession of the sheep. They constituted no part of the *res gestae*. They were not made in disparagement of Day's title or against his interest. They were self-serving declarations and clearly incompetent. (Starkie on Evidence, 65; 1 Rice on Evidence, 420, 421; Stephen's Digest, Evidence, art. 28; 1 Greenleaf on Evidence, 16th ed., secs. 110, 149, 152.) The ruling of the court excluding evidence on the part of the plaintiff of the expense incurred by him in caring for the sheep, and in respect to the wool, and in finding against plaintiff for the gross amount received for the wool cannot be sustained. If the sheep had remained in the possession of the defendants, these expenses would have devolved upon them. At least, plaintiff's claim to the possession of the sheep was in good faith, and defendants could recover nothing more than the value of the use of the sheep while they were in the possession of the plaintiff. Under this ruling plaintiff was clearly entitled to credit for the expense of keeping the sheep and of shearing and marketing the wool. (5 Wait's Actions and Defenses, 499; *Allen v. Fox*, 51 N. Y. 567, 10 Am. Rep. 641; *Yandle v. Kingsbury*, 17 Kan. 195, 22 Am. Rep. 282.)

Argument for Respondents.

F. S. Dietrich and L. R. Rogers, for Respondents.

The judgment appealed from was rendered October 30, 1903. The appeal was taken April 12, 1904, and was from the judgment alone. More than sixty days had elapsed from the rendering of the judgment before the appeal therefrom was taken. Therefore this court cannot review the evidence or the exceptions that the evidence does not support the findings. (Rev. Stats., sec. 4807, subd. 1; *Brady v. Linehan*, 5 Idaho, 732, 51 Pac. 761.) The above section of the Revised Statutes was borrowed from the Code of Civil Procedure of California (see Deering's Code, sec. 939), and has uniformly been construed by the supreme court of that state exactly as this court has construed the statute to mean. (*Curran v. Kennedy*, 89 Cal. 98, 26 Pac. 641; *Handley v. Figg*, 58 Cal. 578; *Bettis v. Townsend*, 61 Cal. 333; *Dominguez v. Mascotti*, 74 Cal. 269, 15 Pac. 773; *Greenwood v. Adams*, 80 Cal. 74, 21 Pac. 1134.) It is almost the universal doctrine in the code states, where the distinction between law and equity has been abolished, that an appellate court, even when the appeal is taken in time and the evidence is properly within the record, will not disturb the findings of the trial court where there is a substantial conflict in the evidence. Such is the Idaho doctrine. (See *Simons v. Daly*, 9 Idaho, 87, 72 Pac. 507; *Stuart v. Hauser*, 9 Idaho, 53, 72 Pac. 719; also *Robson v. Colson*, 9 Idaho, 215, 72 Pac. 951.) There is no dispute that Cunningham and Day entered into a lease in January, 1896, and that Day received from Cunningham three thousand ewe sheep thereunder. But we contend that the lease expired or was supplanted by an agreement by which Day became simply the debtor of Cunningham. By the plain provisions of this lease appellant remained at all times, so long as they were alive, the true owner of the ewes, but was not the owner of their increase; but Day became the owner of the increase and was obligated by the lease to "pay to the first party (Cunningham) for the use and rent of said ewes, nine lambs for each one hundred head of said ewes." The law is well settled that the increase of the female of livestock belongs to the owner of the dam at the time. The only exception to this rule is where the dam may be hired temporarily for a term. The increase during the term belongs

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to the usufructuary. (Cobbey on Replevin, sec. 398; Kent's Commentaries, 360; Edwards on Bailments, secs. 369, 403; *Williamson v. Daniel*, 12 Wheat. (U. S.) 568, 6 L. ed. 731 (slave mother and child); *Putnam v. Wyley*, 8 Johns. 432, 5 Am. Dec. 346; *Concklin v. Haven*, 12 Johns. 314; *Maize v. Bowman*, 93 Ky. 205, 19 S. W. 589, 17 L. R. A. 81; *White v. Storms*, 21 Mo. App. 288; *Stewart v. Ball*, 33 Mo. 154; *Hazebaker v. Goodfellow*, 64 Ill. 238.) James H. Day had possession of all these sheep, some of which, it is admitted, he absolutely owned. He extended mortgages covering the entire band to the Flato Commission Company. This company was interested as a mortgagee. For his own benefit, and for the benefit of the mortgagee, he requested the Flato Commission Company to take care of the sheep and furnish the necessary means to do so. While the commission company was so caring for the sheep Day died, and the commission company sold its mortgages and assigned its interest to the respondents Stoner and Post. While the respondents Stoner and Post were caring for the sheep, in a sense as the agents of the owner, that is, protecting the property of the estate and preserving their security until they could enforce their claim against it by due process of law, and before an administrator could be appointed, appellant brings this action against the respondent Stoner and Post, knowing that they did not claim to be the owners of the sheep. The administrator, therefore, was not only a proper party, but a necessary party to the action. (Cobbey on Replevin, sec. 1168; *McFadden v. Fritz*, 110 Ind. 1, 10 N. E. 120; *Butler v. Rockwell*, 14 Colo. 125, 23 Pac. 462; *Stuckey v. Bellah*, 41 Ala. 700; Wharton on Evidence, secs. 466-468; *Feller v. Feller*, 40 Or. 73, 66 Pac. 468; *Yick Kee v. Dunbar*, 20 Or. 416, 26 Pac. 275; *Joshua Hendy Machine Works v. Dillon*, 135 Cal. 9, 66 Pac. 960; 18 Ency. of Pl. & Pr. 510.)

SULLIVAN, C. J.—The complaint in this action contains the usual averments of an action in claim and delivery. The action was brought against respondents Stoner and Post to recover the possession of three thousand five hundred head of sheep, which sheep had formerly been in the possession of one

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James H. Day, now deceased. Subsequently, at the request of said respondents, the court ordered that the respondent, D. W. Jones, as administrator of the estate of said Day, be made a party. Said Jones, as administrator, answered the complaint and denied that the appellant was the owner or entitled to the possession of said sheep and averred that said sheep belonged to the estate of his intestate Day. The action was tried by the court without a jury and judgment was entered in favor of the respondents, and based on the ground that said sheep belonged to the estate of said Day and that said appellant was not entitled to the possession thereof. The judgment was entered on the 30th of October, 1903, and the appeal was taken on twelfth day of April, 1904. The record shows, among other things, the following facts: That the appellant was the owner of a band of sheep consisting of about three thousand head of ewes; and on the twenty-ninth day of January, 1896, he entered into a contract with said deceased Day whereby he leased said sheep to Day until October 1, 1897, on certain terms and conditions which it is not necessary to set forth further than that the lessee or bailee was to return said sheep to the appellant and make good out of the average of the lambs of said ewes the losses of said sheep. That the lessee was also to pay for the use of said sheep nine lambs on the hundred each year and one and one-half pounds of wool per sheep. That on October 1, 1897, said Day had in this flock of sheep three thousand one hundred head composed of said ewes and their lambs; that after October 1, 1897, Day continued to hold the sheep on the terms of said lease, recognizing the appellant as the owner of the sheep. In the years 1897, 1898, 1899 and 1901, he paid the money received for the wool rental to appellant by check. In October, 1899, Day had about three thousand six hundred head of sheep carried over from the previous year and about two thousand lambs.

During the trial it was admitted that in the spring of 1899 the terms of said agreement between appellant and said Day, deceased, as embodied in said contract, were modified by the agreement of said parties to the extent that in lieu of the nine lambs per hundred ewes, and wool to be paid by James H. Day to the appellant for the use of said sheep for each year, said

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Day was to pay an annual cash rental of \$1,800 for the use of said sheep. It is contended by counsel for appellant that said sheep were held under the original lease as modified by said Day until his death on April 14, 1903. It appears that in September, 1901, the said Day had about five thousand head of said sheep and their increase; it also appears that in June, 1901, Day bought about four thousand one hundred head of Oregon yearling ewes; that these had no lambs in 1901, and that a few of them had lambs in 1902, and that there were heavy losses among said Oregon sheep during the winter of 1901-02. In September, 1902, three thousand one hundred head of said Oregon sheep were sold to one Nebekar. After the sale of said Oregon sheep there remained about six thousand three hundred head of sheep, a few of which were Oregon sheep. It appears that on October 20, 1902, and again on January 24, and February 23, 1903, the said Day executed mortgages upon certain sheep, therein described, to the Flato Commission Company; that on April 14, 1903, said Day died and the Flato Commission Company, by its agent, took possession of said sheep. Soon after that, the commission company sold the mortgages and the indebtedness secured thereby to the respondents Stoner and Post for the sum of \$9,000. On May 1, 1903, the sheep were taken possession of by the respondents Stoner and Post, and the flock at that time consisted of four thousand three hundred and ninety-two head, including eighty-three bucks and two hundred and seventeen Oregon ewes. That was the number of sheep at the commencement of this action.

The sheriff, under the writ issued in this suit, took possession of said sheep after notice to the respondents. After holding the sheep five days, the sheriff turned them over to the appellant, who held possession until the trial of this action. While the sheep were thus held they were shorn of their wool, which was sold by the appellant for the sum of \$2,497.18. The court entered judgment in favor of the respondents for the return of the sheep, or their value, and for \$2,497.18, the value of the wool shorn from the sheep and costs.

A number of errors are assigned and are discussed under six heads by counsel for appellant in his brief. Under the first

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head he discusses the insufficiency of the evidence to support the findings. As the appeal is from the judgment only and was taken more than sixty days after the entry of the judgment, this court is precluded by the provisions of section 4807, Revised Statutes, from reviewing the evidence to ascertain whether it is sufficient to support the findings of fact. (See, also, *Brady v. Linehan*, 5 Idaho, 732, 51 Pac. 761; *Moe v. Harger*, ante, p. 194, 77 Pac. 645.) We can, therefore, only examine the assigned errors of law on this appeal, and cannot examine the evidence to ascertain whether it is sufficient to support the findings and judgment.

Under the second head is discussed assignments of error 1, 7, 8 and 12, which refer to the action of the court in not permitting the appellant to testify to any matter of fact occurring before the death of said Day. The ruling of the court in that matter was based upon the provisions of subdivision 3, section 5957 of the Revised Statutes, which subdivision is as follows and provides that the following persons cannot be witnesses, to wit: "Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or an administrator, upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person." It will be observed that this is an action in claim and delivery and involves the right to the possession of a band of sheep and was commenced by the appellant against the respondents Stoner and Post, and is based solely on a claim or demand against them. The question of the right to the possession of said sheep was the main point in issue, and not the ownership of said sheep, although the appellant alleges that he is the owner.

In an action of claim and delivery, the right to the possession of the property is the main issue. And while counsel for appellant excepted to the order of the court making the administrator of Day a party defendant, he has not discussed that exception in his brief. As I take it, said administrator may have been a proper party to this action, but I do not think he was a necessary party. The appellant in this action makes no

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claim against the estate of Day, and while the respondents Stoner and Post allege that they are the assignees of a claim against the estate of James H. Day secured by mortgage upon the property sought to be recovered, they do not seek any relief against the estate on that account in this proceeding. That being true, this is not an action or proceeding against the executor or administrator upon a claim or demand against the estate of a deceased person, and for that reason the appellant is not disqualified as a witness because of the provisions of said section above quoted. The court erred in refusing to permit the appellant to testify in this case.

The admission in evidence of the declaration of Day made in the absence of the plaintiff to the witness Houtz, to the effect that he was the owner of said sheep, and the affidavits of said Day attached to the mortgages introduced in evidence in which he declares that he is the owner of the sheep, is assigned as error. It is contended that those declarations were self-serving and no part of the *res gestae*, and that they did not accompany or tend to characterize any act of Day pertaining to the possession of the sheep and were made in Salt Lake City, state of Utah, while the sheep were in Idaho or Wyoming. While, on the other hand, counsel for respondent contend that Day's possession of said sheep was *prima facie* evidence of his ownership and that said declarations are a part of the *res gestae*.

The general rule in regard to a party's declarations is that such declarations are competent evidence against him or his representatives and cannot be adduced by or in favor of either. To that general rule there appears to be an exception which is that when declarations, qualifying and giving character to an act proper to be given in evidence, accompany that act, they are admissible, whether self-serving or not, because they are a part of the *res gestae*. (*McConnell v. Hannah*, 96 Ind. 102.) We have many decisions that recognize that exception. In *Reiley v. Haynes*, 38 Kan. 259, 5 Am. St. Rep. 737, 16 Pac. 440, it was held that declarations by a party to the action in possession of personal property, as to her ownership thereof, accompanying some principal fact which they serve to explain and qualify are sometimes said to be a part of the *res gestae*; but

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as the admissibility of such declarations is an exception to the general rule, that the declarations of a party are not competent evidence in his own behalf, they should be allowed only with all the limitations and restrictions imposed upon them.

In *Fellows' Admr. v. Smith*, 130 Mass. 378, it was held in an action by an administrator against a widow of his intestate for the conversion of certain personal property, declarations of the intestate that the property was not his are admissible for the defendant, and the statements of the intestate that the property was his are inadmissible for the plaintiff. The rule laid down in that case appears to us to be the correct rule unless, at least, it clearly appears that such declarations are a part of the *res gestae* and not made for self-serving purposes. We think, under the facts of this case, the court did not err in admitting such declaration.

It appears that while the appellant was in the possession of the said sheep after they were delivered to him by the sheriff, he kept them for some time and during that time they were shorn and the wool sold for the sum of \$2,497.18. And the appellant sought to show the expense of keeping the sheep while they were in his possession as an offset to the claim for damages, and the court refused to permit him to do so. This action of the court is assigned as error.

It is contended by counsel for appellant that the possession of the sheep was taken in good faith and that respondents could not recover more than the value of the use of the sheep while they were in the possession of appellant, and that appellant is entitled to credit for the reasonable cost of keeping the sheep and shearing them and marketing the wool as an offset against the value of the wool, and cites 5 Wait's Actions and Defenses, 499, *Allen v. Fox*, 51 N. Y. 567, 10 Am. Rep. 641, and *Yandle v. Kingsbury*, 17 Kan. 195, 22 Am. Rep. 282. In the first cited authority it is held that "In an action of replevin where the property has a usable value, the value of such use during the time of its wrongful detention should be given," and "In the absence of malice or aggravating circumstances, the plaintiff is entitled to no more than the use of the property would have been worth to him during the period he was deprived of

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its use by the plaintiff." (See *Barney v. Douglass*, 22 Wis. 464.) In the case of *Allen v. Fox*, the question of the proper measure of damages in cases of replevin is discussed at considerable length. The court in that case said in such cases if the owner recovered the interest on the value of the property from the time he was deprived of it, he will generally have a complete indemnity unless the property has depreciated in value, in which case the depreciation must be added to the interest on the value taken as it was before the depreciation, and the two items will furnish the amount of damages. In the case of *Yandle v. Kingsbury*, *supra*, the court held that in an action of replevin where the property in controversy has a usable value, the value of the use of such property during the time of its wrongful detention may be recovered as proper damages.

In an action in replevin where the property sought to be recovered has a usable value and that value amounts to more than interest on the value of the property, a court would be justified in assessing damages for the amount of the usable value of the property and that would be the proper measure of damages, and not interest on the value of the property. And I think under the facts as shown by the transcript, if the respondents finally recover the sheep and their increase, or their value, with the value of the wool shorn from the sheep, the appellant would be entitled, as an offset thereto, to the reasonable cost of shearing the sheep while they were in his possession, and marketing the wool, but would not be entitled to the cost of keeping the sheep from the time he took possession of them to October, 30, 1903, the date of the judgment of the court below; but would be entitled, as an offset, against any damages recovered by the respondents, to the reasonable value of the cost of keeping said sheep, if he has kept them since that date until the termination of this case by the trial court after this decision, as it would be unjust for the appellant to bear the expense of keeping the sheep while correcting the errors of the trial court.

The judgment is reversed and the cause remanded, with instructions to grant a new trial. Costs of this appeal are awarded to the appellant.

Stockslager, J., and Ailshie, J., concur.

Opinion of the Court—Ailshie, J., on Rehearing.

ON REHEARING.

(January 25, 1905.)

AILSHIE, J.—After a rehearing in this case we have discussed and considered the entire record anew and have decided that the conclusion reached by us upon the former hearing is correct. The principal contention made by respondents on the rehearing is directed against that part of the original opinion wherein it is held that the appellant was not, by reason of the provisions of subdivision 3 of section 5957, Revised Statutes, disqualified from testifying concerning matters occurring prior to the death of Day. Counsel argue that since the court holds that Day's administrator was properly brought into the case as a defendant, the result of the litigation must be the same as if the action had been originally brought against the administrator, and that the same rule as to the admission of the evidence of plaintiff would apply in either case. I think counsel correct in this contention and after what examination I have been able to make on the subject, I am inclined to the belief that such an action as this against an administrator is not a "claim or demand" against an estate within the meaning of subdivision 3 of section 5957. Where plaintiff claims ownership and right of possession and the administrator denies the allegation of the complaint and claims the property as that of the estate represented by him, the issue of the case is that of ownership, and the application of subdivision 3, section 5957, would amount to trying the right of property between the two litigants with the court presuming all the while during the course of the trial that the property belongs to the defendant. Such a trial would seem extraordinary. In a case like this the plaintiff is claiming nothing from the estate; he is only pursuing his own property, or what he claims to be his own. The California court appears to have uniformly placed this construction upon their statute which is identical with ours. (*Paulson v. Stanley*, 122 Cal. 655, 68 Am. St. Rep. 73, 55 Pac. 605.)

It is contended by respondents that *Rice v. Rigley*, 7 Idaho, 115, 61 Pac. 290, is in conflict with this position. The members of the court are not agreed as to the reasons for the conclusion

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at which we have arrived, nor are they agreed as to the distinction, if any, to be drawn between this and the Rice-Rigley case. Of course it will be noticed that this case belongs to a different class of actions and looks solely to the title and right of possession of personal property. For the reasons just stated I shall not enter upon any further discussion as to my views in the case.

The judgment of the lower court is reversed and the cause remanded, with instructions to grant a new trial. Costs awarded to appellant.

Stockslager, C. J., and Sullivan, J., concur.

(January 21, 1905.)

HEITMAN v. MORGAN, JUDGE.

[79 Pac. 225.]

JURY PANEL—QUASHING ORDER AND DISCHARGING PANEL—JURISDICTION—HOW ACQUIRED—EXCESS OF JURISDICTION—REMEDY BY CERTIORARI.

1. Where no appeal has been taken from an order of the board of county commissioners in selecting and listing names of persons to serve for the year as jurors under sections 3947 and 3948, Revised Statutes, and no direct attack has been made on grounds of fraud in the selection, the district court is without jurisdiction to quash a panel and discharge a jury on motion of the prosecuting attorney of the county where such motion is not made in any case pending and no litigant is complaining, and neither the commissioners nor the county represented by them are made parties to the proceeding.

(Syllabus by the court—Stockslager, C. J., dissenting.)

2. For the correction of the improper exercise of such excessive jurisdiction, the writ of *certiorari*, and not *mandamus*, affords the proper relief.

(Syllabus by the court—Sullivan, J., dissenting.)

ORIGINAL application in this court for a writ of mandate. Petition denied.

Opinion of the Court—Ailshie, J.

Charles L. Heitman, *pro se*, files no brief.

J. H. Wilson, County Attorney, C. W. Beale, John B. Goode, Earl Saunders, M. A. Folsom, J. L. McClear, A. A. Crane, F. L. Burgan, Edwin McBee and F. C. Jones, for Defendant, file no brief.

AILSHIE, J.—The petitioner, Charles L. Heitman, an attorney of this court, and an elector and taxpayer of Kootenai county, filed his application in this court, praying that a writ of mandate issue out of this court to Honorable R. T. Morgan, judge of the first judicial district of this state, commanding him to rescind and vacate an order made by him on the sixteenth day of November, quashing the panel of jurors returned to serve at the November term of said court, in and for Kootenai county, and to forthwith resummon and reconvene such jury and proceed with the trial of cases pending in said court. An alternative writ issued December 3, 1904, returnable December 8th, and the cause was thereafter heard upon the petition of the plaintiff and a motion of defendant to quash the alternative writ and his answer and return to the writ.

It appears that at the regular January, 1904, meeting of the board of commissioners of Kootenai county, that in compliance with the provisions of sections 3947-3948, Revised Statutes, the board selected a list of one hundred and fifty names and certified the same for jury service in the county during the year 1904. From this order there does not appear to ever have been any appeal taken. On the fourteenth day of November, 1904, the same being the first day of the November term of the district court in and for Kootenai county, T. H. Wilson, prosecuting attorney for Kootenai county, appeared before the court and filed his affidavit and motion praying the court to quash the panel and discharge the jurors summoned for that term of court. The motion was based upon the grounds that the jury list for the year 1904, had been illegally selected, in that the names had not been taken from the poll list as required by the Revised Statutes, but that, on the contrary, the commissioners and other county officers, met at Mr. Heitman's office prior to the regular board meeting and discussed the names of persons they consid-

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ered eligible, competent and qualified to act as jurors from the different portions of the county, each and all of the persons present suggesting names, and that at said meeting the list of one hundred and fifty names were made out and thereafter typewritten by a stenographer who was in the employ of the plaintiff, and delivered to the board of commissioners. This was substantially the grounds of the motion. At the time the motion was made by the prosecuting attorney the plaintiff in this case appears to have been present in court, and without citing any person to appear, or making anyone a party to the proceeding, the court proceeded to hear the matter and take testimony from numerous witnesses who were produced, and after the hearing made his order sustaining the motion and quashing the panel and discharging the jurors. It should be observed that no case was on trial or called for trial when this motion was made, and no case had been set for trial, and that this motion was not made by any party litigant nor in any case pending before the court.

In the proceeding below there seems to have been some effort made to reflect upon the action and conduct of the plaintiff here, Mr. Heitman, who is a reputable and respected attorney of this court, and we deem it consonant with this proceeding to observe that there is nothing in the record that characterizes his conduct other than that of an honorable and upright citizen and lawyer.

Sections 3947 and 3948, Revised Statutes, provide the time and manner of preparing a jury list for the district court in each county for the year. Those sections are as follows:

"Sec. 3947. The board of commissioners of each county must, at their first regular meeting in each year, or at any other meeting, if neglected at the first, make a list of persons to serve as jurors in the district court of the county, for the ensuing year.

"Sec. 3948. They must proceed to select and list from the poll lists of the several precincts in their respective counties, last returned to the clerk of their board, the names of one hundred and fifty persons competent to serve as jurors; and in making such selection, they must take the names of such only as are not exempt from serving, who are in possession of their

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natural faculties, and not infirm or decrepit, of fair character, of approved integrity, and of sound judgment; provided, that if, in any of the counties, the county commissioners shall not be able to select the number required by this section, for jurors, they may select a less number and the highest possible."

The first question which arises for our determination is whether or not the defendant as judge of the district court had jurisdiction and authority to hear and determine the regularity and legality of the jury list and panel drawn therefrom at the time and in the manner he assumed to act. By the provisions of section 1776, Revised Statutes, as amended February 14, 1899 (Sess. Laws 1899, 248), every taxpayer of Kootenai county was afforded the right of appeal from the order of the board of county commissioners in selecting and listing names of persons to serve as jurors for the year 1904 in that county. In addition to the right of appeal granted by statute, it is likely that the principles of equity are sufficiently broad and elastic to permit of a direct attack on that order on the grounds of fraud. In either case, however, the commissioners and the county represented by them, should be brought into court by the regular process of law. There is no more presumption in favor of one official than another when it comes to the honest and faithful discharge of his official duties. The *prima facie* presumption of law is that each has faithfully discharged his duties. Here neither the commissioners nor the county (the citizens) represented by them ever had their day in court. This was a proceeding *sui generis*. The prosecuting attorney, who is by law the legal adviser of the board of commissioners, was the moving party before the district court, and yet it does not appear that he had ever called the matter to the attention of the board or asked them to vacate their order and make and file a new list. Again, it is shown that no litigant was complaining, and no person whose rights or interests could be in any way effected by the action of this jury complained. The individual litigant has every opportunity of testing the fairness and legality of the jury when his case is called for trial, and he is then provided with all the safeguards necessary for his protection and attaining the ends of justice (sections 4379, 7818 and

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7819), and this is available to the state as well as individuals. We are clearly of the opinion that the defendant judge was without jurisdiction and authority to make the order complained of at the time and in the manner and by the proceeding in which such action was taken and order made. Jurisdiction to make such order cannot be acquired in an *ex parte* manner. Since we have concluded that the action taken was in excess of the jurisdiction of the defendant judge, it must necessarily follow that the writ of mandate will not lie and that the remedy is by *certiorari*. (Rev. Stats., sec. 4962).

There is another reason why the writ of mandate as prayed for cannot issue in this case. To issue the writ and require the trial judge to resummon the jury and proceed with the trial of jury cases would necessitate the continued presence of the judge in Kootenai county, while, on the other hand, it is shown that the regular term of district court was called to convene in Shoshone county on the next judicial day after the date of our hearing this application, and that only one term of district court has been held in Shoshone county for the year 1904. The issuance of the writ would therefore interfere with a regular term of court in another county of the same judicial district and delay the business of that county, and possibly deprive the county of its constitutional right to two terms of court each year (Const., art. 5, sec. 11). The alternative writ will therefore be quashed and the petition denied. No costs awarded.

SULLIVAN, J., Concurring in Part Only.—This is an application for a writ of mandate and my associates hold that the plaintiff has mistaken his remedy, that his remedy was by writ of review. I cannot agree with them in that conclusion. The facts are quite fully stated in the opinion of Mr. Justice Ailshie. The plaintiff prays for a writ of mandate commanding the judge of said court to rescind and vacate an order made by him on the sixteenth day of November, whereby he quashed the panel of jurors returned to serve for the November term of said court and to forthwith resummon and reconvene said jury and proceed with the trial of cases pending in said court.

It appears that the petitioner was apprehensive that said November term of court would pass without a trial of any of

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the jury cases on the calendar, as in fact it did so pass. The term was commenced on the tenth day of November, 1904, and closed on the following twelfth day of December, without a trial of any of the jury cases on the calendar, and the failure to try any of the jury cases was because of the discharge of the panel as aforesaid. It is a part of the history of the state that two terms of said court are held in said county each year, and one had been held in the month of April prior to said November term, and it appears that unless the action of the court in setting aside said panel was itself set aside, no jury cases would be tried for perhaps six months thereafter; and as section 18 of article 1 of the state constitution provides that courts of justice shall be open to every person and a speedy remedy afforded for every injury of person, property or character, and right and justice shall be administered without sale, denial, delay or prejudice; it would appear that that provision of said section providing that a speedy remedy shall be afforded without delay, would be violated by the unauthorized act of said court in the discharge of said jury. The record of the proceedings of said court in quashing said panel is before the court in this action, and the main object and purpose of the petitioner was to compel the court to rescind said order and to proceed without delay and try the jury cases, especially criminal cases, that were on its calendar in compliance with the above noted provisions of the constitution.

In the decision of this case the court holds that the district court exceeded its jurisdiction in discharging said panel, and this proceeding was brought not only to set aside that unauthorized action of the court, but its main object or purpose is to compel the court to proceed with the trial of the jury cases and not continue them until the next term of said court. An application for a writ of mandate was the proper proceeding, and the writ should have been granted. The action of a court upon an application for a writ of review cannot extend further than to determine whether an inferior tribunal, board or officer has regularly pursued the authority of such tribunal or board. (Rev. Stats., sec. 4968.) And the judgment of this court going that far and no further, would not give the plaintiff the

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relief he is entitled to under the allegations and prayer of his petition. The court had discharged, without authority of law, the jury that had been regularly drawn and summoned, which action would necessitate the continuance of the jury trials for that term, and the main object and purpose of this action was to compel the judge to proceed and try such cases without unnecessary delay. Under a writ of mandate this court can compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station, and it was the plain duty of said court under the provision of the constitution above quoted, and the law, to proceed and try all jury cases on the calendar that the parties desired to have tried at that term. And after this court has held that the trial court exceeded its jurisdiction in the discharge of the panel, it seems to me that it was the duty of this court to issue a writ of mandate directing the trial court to resummon the jurors illegally discharged and to proceed with the trial of the jury cases then on its calendar.

In *Merrill on Mandamus*, section 46, it is held that if an inferior tribunal declines to hear a case on what is termed a preliminary objection, and the objection is purely a matter of law, the writ will issue if such tribunal has misconstrued the law; and the author there states that most all of the authorities agree that if a tribunal dismisses a case under the mistaken conclusion that it has not jurisdiction, its action will be reviewed by writ of mandate, and it will be compelled to try the case or hear the matter. In this case upon a preliminary objection the panel was discharged, and as a result of that mistake all jury cases were continued for the term, and this court having held that the district court exceeded its jurisdiction in that matter, it should have been compelled by mandate to resummon the jurors so discharged and proceed with the trial of the jury cases, and the qualifications of each of said jurors could have been then and there determined. By a writ of review the wrong of which the plaintiff complains could not be redressed, as under it the district court could not be compelled to proceed without delay and try the jury cases that were ready for trial at that term of court.

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In *People v. Judge*, 22 Mich. 493, it is held that where it was shown that service had been made by the sheriff and the circuit court on motion ordered such service to be set aside as unauthorized by statute, *mandamus* would be granted to compel said court to vacate said order. In the case at bar the court made an order not authorized by statute and *mandamus* should be granted to compel the court to vacate said order.

In *People v. Judge*, 59 Mich. 529, 26 N. W. 694, it is held that a decision quashing an indictment may be reviewed, the only question being, What is the better form of review? That and *mandamus* was held the most appropriate remedy. So in the case at bar the question is, Which is the most appropriate remedy? Review is not, because the wrong complained of cannot be completely remedied under that proceeding. *Mandamus* is, because a full and complete remedy may be given by that writ. (See *Hill v. Morgan*, 9 Idaho, 718, 76 Pac. 323.)

It is not sufficient to say that the issuance of the writ of *mandate* might interfere with the right of Shoshone county to have two terms of court during the year 1904 as provided by the constitution, as the rights of the people of Kootenai county to have two terms of court each year is given by the same provision of the constitution.

I concur in the conclusion reached by Mr. Justice Ailshie, to the effect that the court had no jurisdiction to make the order discharging said panel, and dissent from the conclusion that *certiorari* is the appropriate remedy.

STOCKSLAGER, C. J., Concurring in Part and Dissenting in Part.—I concur in the conclusion reached by Mr. Justice Ailshie in so far as he says the proper remedy was by *certiorari*. I do not concur in the conclusion reached by the majority of the court that the defendant judge exceeded his jurisdiction in making the order discharging the panel. The presumption that all officers discharge their duty has a direct application in this proceeding to the commissioners of the county who are charged with the selection of names of persons to serve as jurors for the ensuing year. From the showing made there can be no question but that their desire was to get none but

Points decided.

good, responsible citizens of the county for jury service. The county attorney, who is an officer of the court, is charged with the duty of aiding the court in the discharge of its every duty as well as protecting citizens in both civil and criminal cases in so far as he can with jurors properly and legally selected. If for any reason he believed the persons in attendance were disqualified from service, it was his duty to call such fact to the attention of the court. This he did, and the court, after an examination of the facts, discharged the panel. I do not think the court exceeded its jurisdiction in making this order. One of the grave responsibilities inherent in the trial courts is to provide legal and competent jurors for the trial of all cases that may come before it, and when the judge, after the examination, was satisfied that the jury list had been improperly, if not illegally, selected by the county commissioners, it was his legal right, as well as his duty, to remove any question of the legality of the panel by pursuing the course he did. As to what may have been his duty after the panel was discharged has nothing to do with the legality of the order complained of.

(January 24, 1905.)

WATSON v. MOLDEN.

[79 Pac. 503.]

**VERDICT OF THE JURY CONCLUSIVE WHEN—FALSE REPRESENTATIONS—
RELIANCE THEREON—SHARES OF STOCK IN AN INCORPORATED CANAL
COMPANY—PERSONAL PROPERTY—STATUTE OF FRAUDS—ASSIGN-
MENTS OF ERROR ONLY CONSIDERED WHEN.**

1. Where there is a substantial conflict in the evidence on the material issues involved, the verdict of the jury must stand.

2. Where M. states to W. that certain things pertaining to the sale of shares of stock in a canal company are true, also facts pertaining to the sale of his interests in certain lands are true, and is informed by W. that he will rely upon his statements, and purchases such shares of stock and the interest of M. in the land wholly relying upon the representations of M., and such statements are afterward found to be false and resulted in inducing

Argument for Appellant.

W. to purchase. *Held*, that M. must respond in damages for his false and fraudulent statements.

3. Where it is shown that W. is a stranger and unaccustomed to the wants and needs of water for irrigation of desert land, and M. is a real estate dealer accustomed to the necessity and amount of water per acre for the irrigation of land that he possesses in person by entry under the desert land laws of the United States, W. may rely upon the statements made by M., especially when he informs M. of his want of knowledge and information pertaining to such lands and stock.

4. Certificates of shares of stock in an incorporated canal or ditch company are personal property under the provisions of section 2611, Revised Statutes.

5. Errors will not be considered in this court where it is shown by the record that the matters complained of were not raised on the motion for new trial and urged in the lower court.

(Syllabus by the court.)

APPEAL from the District Court of Bingham County.
Honorable James M. Stevens, Judge.

Action for damages; judgment for plaintiff, from which and an order overruling a motion for new trial, defendant appeals.
Affirmed.

The facts are stated in the opinion.

Chalmers & Jones, for Appellant.

As a general proposition, no reliance can be placed on statements as to facts which are obvious or of which the defendant party has knowledge, or which are indefinite or suspicious, or which are not regarded as statements of fact, as opinion, trade talk, etc., or where the means of knowing the truth are at hand and it could be known by exercising the diligence of an ordinary prudent man. The Idaho court in stating this principle declares that in cases of this character it must be alleged and proved "That plaintiff was fraudulently induced to forbear inquiry as to the truth of the representations of the defendant." Another means of stating the doctrine that the purchaser has no right to rely on the statements of the vendor concerning matters where the means of knowing the truth are open to both. The plaintiff relies for the support of his verdict solely upon

Argument for Respondent.

the proposition that the defendant failed, neglected and refused to transfer or convey to him the amount of water or water right which he agreed to convey. The evidence as to what the agreement was may be considered somewhat conflicting, but at any rate it appears to have been wholly verbal, and not in writing. In Idaho, ditch and water right are real property. (Idaho Rev. Stats., secs. 2825, 6007, 6009, subd. 5; *Ada Co. Farmers' Irr. Co. v. Farmers' Canal Co.*, 5 Idaho, 793, 51 Pac. 990, 40 L. R. A. 485; *Hall v. Blackman*, 8 Idaho, 272, 68 Pac. 19; *McGinness v. Stanfield*, 6 Idaho, 372, 55 Pac. 1020.) The Idaho statute making such a contract "invalid" is tantamount to making it void. (*Dung v. Parker*, 52 N. Y. 496, 497; *Dunphy v. Ryan*, 116 U. S. 495, 6 Sup. Ct. Rep. 486, 29 L. ed. 703; *Welch v. Whelpley*, 62 Mich. 15, 4 Am. St. Rep. 810, 28 N. W. 676; *Wakefield v. Greenhood*, 29 Cal. 598.)

F. S. Dietrich, for Respondent.

Even when a statement by the vendor as to the value of the property is in question, it is for the jury to say whether or not the statement is one of fact, such as will subject the vendor to a charge of fraud, or is a mere expression of opinion upon which the vendee cannot rely. (*American Nat. Bank v. Hammond*, 25 Colo. 367, 55 Pac. 1090; *Oakes v. Müller*, 11 Colo. App. 374, 55 Pac. 193; *Fargo Coke Co. v. Fargo Gas Co.*, 4 N. D. 219, 59 N. W. 1066, 37 L. R. A. 593; *Mead v. Bunn*, 32 N. Y. 280; *Redding v. Wright*, 49 Minn. 322, 51 N. W. 1056; *Cabot v. Christie*, 42 Vt. 121, 1 Am. Rep. 313; *Speed v. Hollingsworth*, 54 Kan. 436, 38 Pac. 497.) In view of the record in this case, as we shall see, it is perhaps unimportant to discuss the question whether or not the property to be conveyed was personal property or real estate. We concede that in this jurisdiction water rights, strictly speaking, are classed as real estate; but in the transaction under consideration it is clear that the property which the defendant contemplated transferring was personal property. It is agreed that the water right was to be in the People's Canal and Irrigation Company, a corporation. It is further conceded by all parties that such water rights were and are evidenced simply by the capital stock of the corpor-

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ation, and that the rights were transferred solely by the transfer of certificate of stock, in the ordinary mode of transferring corporation stock. Upon any theory the defendant has not kept the agreement which he conceded both by his answer and testimony; that is, to transfer enough water for eighty acres. (Idaho Rev. Stats., sec. 2611; *Wells v. Price*, 6 Idaho, 490, 56 Pac. 266.) This court has repeatedly recognized an oral contract, relating to transfer of water and ditch rights as binding after one party thereto has performed. (*Male v. LeFlang*, 7 Idaho, 348, 63 Pac. 108; *Deeds v. Stephens*, 8 Idaho, 514, 69 Pac. 534; *Francis v. Green*, 7 Idaho, 668, 65 Pac. 362; *Stowell v. Tucker*, 7 Idaho, 312, 62 Pac. 1033; *Feeny v. Chester*, 7 Idaho, 324, 63 Pac. 192.)

STOCKSLAGER, C. J.—This case is here on appeal from the judgment of the district court of Bingham county, and from an order overruling a motion for a new trial. It seems that appellant in June, 1902, was in possession, by virtue of a desert entry under the United States land laws, of two hundred and forty acres of land in Bingham county, his entry bearing date June 14, 1902. It is alleged in the complaint that on or about June 17, 1902, defendant (appellant here) showed said lands to plaintiff (respondent here) and represented to plaintiff that he had a sufficient water right for said lands, and would sell to plaintiff all his right and interest in and to said lands, together with a good and sufficient water right, at the rate of one inch to the acre, for the sum of \$800; that at said time plaintiff was a stranger in Idaho, having recently come from Iowa, and had never lived in or had any experience in or with a country where irrigation is required for raising crops, and knew nothing about the amount of water required to irrigate an acre of land, or the mode of irrigation, all of which was well known to defendant at all times during the negotiations relative to the transaction. It is next alleged that plaintiff knew nothing about the boundaries of said tract of land and relied wholly upon the representations made by defendant in pointing out the said land and the boundaries thereof, all of which defendant well knew; that defendant represented to plaintiff that in all probability there was not more than five acres, and stated positively that there was not to exceed fifteen acres, at most, that

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were rough or rocky or incapable of practicable irrigation. That wholly relying upon defendant's representations that there was not to exceed fifteen acres of waste land in the two hundred and forty acres described, and that defendant would furnish with said land a good and sufficient water right for said land in the amount of two hundred and forty inches, and, being induced thereby, as defendant well knew, the plaintiff made an agreement with defendant to purchase the defendant's interest in said land, including said water right, for the sum of \$800, and plaintiff paid to defendant said sum of \$800, and defendant assigned to plaintiff defendant's entry of said lands in the United States land office, and delivered to plaintiff fourteen (14) shares of the capital stock of the People's Canal and Irrigation Company, a corporation; that said purchase price was paid to defendant before said stock was turned over to plaintiff by defendant. That in order to induce plaintiff to take said stock, defendant represented to him that each share of stock in said corporation entitled the holder thereof to the use of twenty-five (25) inches of water from the canal of said company; and the defendant further stated and represented that the plaintiff could conduct said water from the canal of said Canal and Irrigation Company to the said lands at a cost of not to exceed \$50, and further represented that he, plaintiff, would have the right to conduct said water through what is known as the American Falls Canal and Power Company's canal, which lies near said lands. That after plaintiff had paid the defendant the full consideration for said land and water right, and when defendant came to deliver said certificates of stock for fourteen (14) shares as aforesaid, plaintiff objected to receiving the same, but upon the assurance of the defendant that said certificates entitled the holder to the use of water considerably in excess of two hundred and forty (240) inches, and that the same represented a good and sufficient water right for said lands, and that said waters could be conducted through the American Falls Canal Company, and could be taken from said People's canal to said lands at an expense not to exceed \$50, plaintiff being a stranger and wholly ignorant of his rights as a holder of said stock and wholly relying upon said representa-

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tions made by defendant, as defendant well knew, received said certificates of stock. That said representations by defendant to plaintiff were false and fraudulent and were knowingly made by the defendant for the purpose of inducing plaintiff to make said purchase and pay to defendant said money, and were untrue, and defendant violated his agreement with plaintiff, to wit: At least seventy (70) acres of said land, instead of fifteen, are broken and rocky and are waste lands and practically worthless. That the fourteen (14) shares of stock delivered by defendant to plaintiff as evidence of the water right for said lands do not, and did not, entitle the holder to two hundred and forty inches of water or any amount in excess of one hundred (100) inches; that plaintiff is informed and believes that said right is not clear, being burdened with an indebtedness, in that said canal company owes practically over \$10,000, secured by mortgage upon its canal system and water right, and that said stock is assessable to pay said indebtedness, and that the rights of the holder of said fourteen (14) shares of stock are subject to said indebtedness and are burdened thereby. That the holder of said stock is not entitled and has no right to convey any portion of the water represented by said stock, or any water in the People's Canal and Irrigation Company's canal through any portion of the canal of the American Falls Canal and Power Company. That it is not practicable to conduct water from the People's Canal and Irrigation Company to any portion of said lands, for the reason that there is no ditch or canal leading from said main canal to said lands, and it is financially impossible so to do; that is to say, it would cost to construct a lateral ditch from the canal of said People's Canal and Irrigation Company to said lands an amount far in excess of what a water right could possibly be worth, and instead of costing \$50, as represented by defendant, it would cost approximately \$2,000 to conduct said waters from the point where plaintiff would have a right to receive said waters by reason of the fact that he holds said stock to said land.

Then follows an allegation that by reason of the violation by defendant of this agreement to deliver to plaintiff at least two

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hundred and twenty-five acres of irrigable land, and a good and sufficient water right to the amount of two hundred and forty inches measured under a four-inch pressure at a point from which it would not cost to exceed \$50 to conduct the same to said lands, plaintiff has been damaged in the sum of \$2,500. That in order to amicably compromise and adjust this matter with defendant, plaintiff offered to rescind said contract of purchase and deliver back to defendant said lands and water stock upon condition that defendant would reimburse plaintiff the money which he, plaintiff, had paid, which offer was by defendant refused. That defendant has refused to make any reparation to plaintiff of any kind and has refused to furnish or turn over to plaintiff any other, greater or additional water right than as evidenced by said shares of stock.

Prayer for judgment for \$2,500 damages follows.

A demurrer was filed to this complaint, to wit: That said complaint does not state facts sufficient to constitute a cause of action against the said defendant. On May 25, 1903, this demurrer was overruled by the court. On June 6, 1903, defendant filed his answer and admits that he showed to the plaintiff the lands described in the complaint, but that it was at the special instance and request of plaintiff. Denies the allegation of the plaintiff as to representations of the water right for the whole of said land or any part or portion thereof, except eighty acres of the same, or that he had any water right whatever for said land except that which was represented by the fourteen (14) shares of the capital stock of the People's Canal and Irrigation Company; denies all the allegations as to the sale of a water right in excess of eighty inches to go with said land, for the sum of \$800, and alleges the fact to be in this respect that he did promise and agree to sell and deliver with said land the fourteen (14) shares of capital stock aforesaid, which he did then and there sell and deliver substantially as alleged in the complaint. That he then and there stated to the plaintiff that in his opinion and belief the said stock represented at that time about eighty inches of water measured under a four-inch pressure per share, and that the water values of said stock would probably increase thereafter as it had theretofore. That

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he further cautioned and advised plaintiff that before completing said sale and purchase he should go and see the secretary of said company as to the water value of said stock, and the possibility and practicability of obtaining the water for use upon said land.

As to the allegation of plaintiff's experience in and want of knowledge concerning irrigation and placing his denial on that ground, denies that allegation; denies positively that such matters last mentioned were ever known to defendant; denies all the allegations of the complaint of statements alleged to have been made by him to plaintiff as to the boundaries of the land, or that in all probability there were not more than five acres, or that positively there were not to exceed fifteen acres at most of said land which were rough or rocky or incapable of irrigation. Alleges the fact to be that he conducted the plaintiff to and upon the higher portions of said ground and pointed out the portions which, in his opinion it would be impracticable to irrigate, saying nothing whatever as to the number of acres; alleges that he has since learned that it is feasible and practicable to conduct water upon and irrigate every acre and smallest legal subdivision of said two hundred and forty acres from the ditches and canals which are established in that locality; denies that any representations whatever made by defendant to plaintiff were false or fraudulent for any reason whatever; denies that the shares of stock transferred to plaintiff entitled the plaintiff to no more than one hundred inches of water, but alleges, as stated by defendant to plaintiff at the time, they represented one hundred and twelve inches of water, and now by reason of repairs and improvements made in, upon and along said People's canal, each of said shares entitles the holder to ten inches of water measured under a four-inch pressure. As to the allegation of plaintiff with reference to the \$10,000 indebtedness against the People's Canal and Irrigation Company, defendant says that notwithstanding the fact that a mortgage was on record in Bingham county showing such indebtedness, he advised and notified the plaintiff that such a mortgage existed and was then in force, for the said sum.

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Answering the allegation that plaintiff upon certain conditions, to wit, the return of the \$800 paid by plaintiff to the defendant, says that under the general government of the United States he lost and forfeited all his rights and privileges to enter land under the public land laws, except the right of homestead entry.

A jury trial was had and a verdict returned in favor of the plaintiff for the sum of \$435; judgment accordingly.

A large number of assignments of error are enumerated in the record, but we find only a few of them are urged in appellant's brief. Appellant's counsel earnestly insists that "the verdict is not supported by the evidence." In his brief he says: "There is a direct contradiction of Mr. Watson's uncorroborated testimony by Mr. Madden as to the price first asked for the land." An examination of the record discloses that this statement is supported by the evidence contained in the record, and we may say that there are contradictions on nearly every material issue submitted to the jury. Under a long, well-established rule of this court, where it is shown that the case was submitted to a jury, they having passed upon all questions of differences as to the facts in the case, the trial court having refused a new trial, this court will refuse to disturb the judgment on this ground. The reasons for this conclusion have been frequently discussed by this court. It seems to me that all the trouble arising over this question grows out of the apparent difficulty in distinguishing between conflicting evidence and an entire lack of evidence to support the verdict of the jury. Modern decisions are almost a unit in holding that where there is a substantial conflict in the evidence upon the material issues involved, the verdict of the jury should not be disturbed by the appellate court. On the other hand, it is equally true that where the record fails to show any conflict in the evidence of a substantial character and on the material issues, and it is also shown by the record that there is not sufficient evidence of the above character to support the verdict, then it is the duty of the trial court to disregard the verdict by granting a new trial. If that court fails to do so then this court will reverse the judgment and order a new trial. This question being disposed of,

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we come to the more serious question urged by appellant, to wit: *False representations*: There is a direct and radical conflict in the evidence on this issue presented by the complaint and put in issue by defendant's answer, plaintiff testifying to certain conditions and statements made by defendant as to the surface condition of the land, the water right he proposed to transfer to go with the land, the expense of getting water upon the land sufficient for its proper irrigation, the source from whence said water was to be procured, the fact that he was a stranger in the country and entirely unaccustomed to the proper irrigation and needs of the desert land to successfully grow crops, and hence wholly and entirely dependent upon the representations of the defendant for information pertaining to all these questions.

The defendant with equal emphasis testifies that he made no false statements to plaintiff; that in the relinquishment of the desert entry to the lands in controversy and the assignment of the shares of stock in the "People's Canal and Irrigation Company," he did all he had agreed to do for the consideration of eight hundred dollars paid to him by plaintiff. That the jury passed upon this question in dispute by the respective parties to the action is evidenced by the instructions of the court. The very first one reads as follows:

"Gentlemen of the jury: You are instructed that in the consideration of the testimony in this case, your first inquiry should be, What was the agreement of the parties relative to the transaction of the sale referred to in the pleadings and testified to by the parties themselves? Upon this issue, as you will have observed, there is a material conflict between testimony of the parties, and it will be your duty to determine from the testimony of the parties and all the surrounding circumstances in evidence which party has told the truth, the plaintiff or the defendant." The court further said to the jury in this instruction that if they accepted the statements of the defendant as true the plaintiff could not recover; and, on the other hand, if they believed the plaintiff had truthfully related the facts and circumstances surrounding the transaction, he was entitled

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to recover his actual damages. From the quotation marks we only give the substance of the instruction. This instruction was certainly fair and correctly stated the law, and no exception was taken to it by either party. It seems that all instructions requested by either party were given by the court, and we find no exception to any of them in the record, hence we conclude that so far as the law of the case was concerned both parties were satisfied.

The third instruction requested by defendant and given by the court follows: "The jury are instructed that in order that the plaintiff may avail himself of the action of fraud set up in the pleadings in this case, the jury must believe from the evidence, not only that the statements and representations set forth in said pleadings were made, but also such statements and representations were false; that they were made with intent to deceive and defraud the plaintiff—that the plaintiff was induced thereby to enter into the contract and that he has sustained damages by reason thereof."

Counsel for defendant requested twenty instructions, all of which were given by the court without modification. They covered every question raised by the pleadings, and were certainly not unfavorable to the defendant.

Counsel for appellant cites a number of authorities to support his contention, but a careful examination of them does not support him in all he claims for them. He cites *Brown v. Bledsoe*, 1 Idaho, 746, rendered in 1879. The court, in stating what the complaint must allege, says: "1. That the representations made by defendants were false; 2. That defendants knew them to be false; 3. That they made them with intent to defraud plaintiff; 4. That such representations were material and not matters of opinion; 5. That the plaintiff relied upon such representations in making the contract or doing the act from which such damages arose; that plaintiff was fraudulently induced to forbear inquiry as to the truth of the representations made by defendant." It seems that the complaint in the above case was deficient in all these particulars, and a demurrer was sustained to its sufficiency. There is no comparison in the facts of the above case and the one at bar. In the *Brown-*

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Bledsoe case the statements were in reference to certain mining property and were easily within the power of the plaintiff to ascertain. It involved the payment of \$20,000 and belonged to that class of transactions that depend upon an examination and report of an expert.

Our attention is next called to *Frenzel v. Miller*, 37 Ind. 1, 10 Am. Rep. 62 (decided in 1871); *Bigby v. Powell*, 25 Ga. 244, 71 Am. Dec. 168; *Commissioners S. J. v. Younger*, 26 Cal. 176; *Yeates v. Pryor*, 11 Ark. 58; *Dickson v. Richardson*, 16 Ark. 114; *Long v. Warren*, 68 N. Y. 426. A number of other cases are cited, but we do not find them unanimous or many of them holding that under the facts in the case at bar the plaintiff could not recover.

In *American Nat. Bank of Denver v. Hammond*, 25 Colo. 367, 55 Pac. 1090, the fourth clause of the syllabus says: "False representations are actionable only when relied and acted upon." The fifth clause says: "The question whether such statements as to the value of the stock were mere expressions of opinion, and not statements of fact, was for the jury." (*Oakes v. Miller*, 11 Colo. App. 374, 55 Pac. 193.)

In the fourteenth volume of American and English Encyclopedia of Law, 120, the following language is used in the text: "By the overwhelming weight of authority, ordinary prudence and diligence do not require a person to test the truth of representations made to him by another as of his own knowledge, and with the intention that they shall be acted upon if the facts are peculiarly within the other party's knowledge or means of knowledge, though they are not exclusively so, and though the party to whom the representations are made may have an opportunity of ascertaining the truth for himself." A long list of authorities are collated to support this text. Again at page 122, same volume, it is said: "Some of the courts and many individual judges have gone so far as to lay down the rule broadly that a person is entitled to relief on the ground of fraud in the case of positive false representations, intended to be relied upon and to deceive, notwithstanding he had a present opportunity of discovering that the representations were false, and might have known the truth by proper examination and in-

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quiry, and notwithstanding his means of knowledge were equal to those of the other party. Though there are decisions to the contrary, this view is supported by the better reason, and is in accord with the unmistakable drift of opinion as shown by the later cases. This doctrine is held in the later English cases." This text is also supported by numerous authorities. In *Fargo Gas & Coke Co. v. Fargo Gas & Electric Co.*, 4 N. Dak. 219, 59 N. W. 1066, Mr. Justice Corliss, after discussing the facts and the law, in a very instructive and interesting way, says: "The defendant as a matter of law had a right to rely implicitly upon the statements made by the plaintiff touching the character of this plant; so long as the defendant did not actually know the representations to be false it was not under any obligations to investigate to determine their truth or falsity." This action involved the sale of the Fargo Gas and Coke Company to the Fargo Gas and Electric Company. Plaintiff sued for balance on the contract. Defendant set up defense of partial failure of consideration from the nondelivery of some of the property purchased, and also a counterclaim for damages arising out of the alleged deceit of the plaintiff making the sale. The court, after commenting upon numerous authorities, uses this very strong and pertinent language: "The unmistakable drift is toward the doctrine that the wrongdoer cannot shield himself from liability by asking the law to condemn the credulity of his victim."

See, also, *Mead v. Bunn*, 32 N. Y. 280; *Redding v. Wright*, 49 Minn. 322, 51 N. W. 1056; *Cabot v. Christie*, 42 Vt. 121, 1 Am. Rep. 313; *Speed v. Hollingsworth*, 54 Kan. 436, 38 Pac. 497. A number of other cases are cited by respondent, all tending to show that the modern authorities have relaxed the rule prevailing in the earlier cases involving a settlement of this much disputed question. It is difficult to establish a fixed rule for the government of cases of this character." It is seldom that two cases are found with the same state of facts existing, and the rule seems to be that each case is dependent upon its own particular facts, bearing in mind at all times that the law does not countenance fraudulent statements or misrepresentations made for the purpose of deceiving an intending purchaser. If such facts are shown by the record to exist, the courts will refuse to grant him relief for his wrongful acts.

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It is next urged by counsel for appellant that plaintiff relies for the support of his verdict solely upon the proposition that the defendant failed, neglected and refused to transfer or convey to him the amount of water or water right which he agreed to convey. He says "that the transfer was only verbal and not in writing." He further says: "The case is thus brought manifestly within the statute of frauds," and cites section 2825, Revised Statutes, to show that "in this state a ditch and water right are real property." It is true that this court in a number of decisions has held that a ditch and water right are real property. In *Ada Co. Farmers' Irr. Co. v. Farmers' Canal Co.*, 5 Idaho, 793, 51 Pac. 990, 40 L. R. A. 485, the court held that "Under the provisions of section 2825, Revised Statutes, possessory rights to ditch and water rights are real property or real estate."

In *McGinness v. Stanfield*, 6 Idaho (Hasb.), 372, 55 Pac. 1020, the question before the court was the sufficiency of a verbal sale of a ditch and water right. The same was true in *Hall v. Blackman*, 8 Idaho, 272, 68 Pac. 19. None of these actions involved stock representing water in a canal company. All that can be said in support of appellant's contention is that after purchasing the stock of the canal company, completing a lateral ditch and turning the water into the ditch (under the above decisions) would make the ditch—hence the water—real estate. All that defendant attempted to sell or that plaintiff believed he purchased was so many shares of stock in a canal company, which passes by assignment and delivery. This being true the property sold was only personal property.

In *Wells v. Price*, 6 Idaho, 490, 56 Pac. 266, this court held that an attachment of land upon which water was being used from a certain irrigating ditch, the defendant owning certain shares of stock in the corporation owning the ditch, the ditch or canal did not include the shares of stock.

Section 2611, Revised Statutes, seems to settle the question as to the status of the property—"shares of stock in a corporation." It says: "Whenever the capital stock of any corporation is divided into shares and certificates therefor are issued, such shares of stock are personal property and may be trans-

Points decided.

ferred by indorsement by the signature of the proprietor or his attorney or legal representative and delivery of the certificate."

Counsel next urges that the bar of the statute of frauds can be taken advantage of under a general denial of the contract, and cites authorities. It is not necessary to pass upon this question in this case with the record before us. Neither in the motion for a new trial nor the specifications of error do we find the attention of the lower court directed to this question. Specification 36 is "that the verdict, decision and judgment together are against the law." Speaking of this specification counsel for respondent well says: "Such a specification is in law no specification at all. It points out nothing and is universally held to be ineffective as a specification."

Other errors are assigned, but in our view of the case it is unnecessary to consume further time in discussing them. The jury passed upon the controverted facts with a large amount of conflicting evidence before it, and found for the plaintiff, and we find no error in the ruling of the court as to the law of the case.

The judgment is affirmed. Costs awarded to respondent.

Ailshie, J., and Sullivan, J., concur.

(January 26, 1905.)

ERCANBRACK v. FARIS.

[79 Pac. 817.]

CONSTRUCTION OF CONTRACT.

1. Where E. & Co. enter into a written contract with C. & Son & Co. to complete a certain grading contract, and it is shown that C. & Son & Co. have partially completed the contract before assignment to E. & Co., and under the terms of the original contract of C. & Son & Co. with another that ten per cent of the contract price shall be retained until the final completion of the works, *held* that the words "hereafter accruing" reserves to C. & Son & Co. the ten per cent earned at the time of the assignment of the contract.

(Syllabus by the court.)

Opinion of the Court—Stockslager, C. J.

APPEAL from District Court of Ada County. Honorable George H. Stewart, Judge.

Judgment for plaintiff, from which defendants appeal. Reversed.

Ira E. Barber and W. E. Borah, for Appellants, cite no authorities in their brief upon the point decided.

Richards & Haga, for Respondents, cite no authorities not found in the opinion on petition for rehearing.

STOCKSLAGER, C. J.—The plaintiffs (appellants) commenced this action in the district court to recover the sum of \$2,925.35, together with interest from March 21, 1903. They allege that they are copartners doing business as C. F. Ercanbrack & Co., and that the defendants, A. W. Faris and F. S. Kesl, are copartners doing business as Faris & Kesl. Then follows an allegation that on or about the fifteenth day of April, 1902, defendants entered into a certain contract with D. W. Catts, H. R. Catts and G. H. Harvey, doing business as D. W. Catts & Son. A copy of this contract is made a part of the complaint and marked exhibit "A."

The fourth allegation is that on the twenty-eighth day of July, 1902, plaintiffs entered into a contract with defendants and said D. W. Catts & Son. A copy of this contract is also made a part of the complaint, marked exhibit "B." Then follows an allegation that by and with the consent of defendants, on the eighth day of October, 1902, plaintiff and said D. W. Catts & Son, G. H. Harvey and G. P. Bowman, under the firm name of D. W. Catts & Son & Co., entered into a certain written contract, a copy of which is made a part of the complaint, marked exhibit "C."

The fifth allegation is that on or about the twenty-first day of March, 1903, there was a general balance of \$1,126.60 due and owing from defendants to plaintiffs on account of supplies furnished and money advanced under the terms of said contracts, marked exhibits "A" and "B."

For a second cause of action plaintiffs allege that pursuant to the terms of the contract marked plaintiffs' exhibit "C,"

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said plaintiffs performed all the remaining works to be performed by said D. W. Catts & Son under the terms of the contract marked exhibit "A," and so completed the same on the twentieth day of January, 1903, and received from defendants final estimate of such work. That by reason of such work so performed by plaintiffs and numerous partial payments made by defendants therefor as said work progressed, there was on the twenty-first day of March, 1903, a general balance of \$1,795.75 due and owing from said defendants to plaintiffs. Then follows demand for judgment for the sum of \$2,925.35, with interest from March 21, 1903.

Defendants answering the first cause of action in the complaint deny all the allegations as to the indebtedness as therein stated. Answering the second cause of action defendants admit all the allegations of the complaint excepting as to amount of indebtedness due from defendants to plaintiffs, which they say is \$903.61, and which amount they offered in writing the day and time it became due upon plaintiffs giving a written release and discharge from all liabilities growing out of said grading contract.

From the brief of appellants we gather the facts in this case to be as follows: Defendants had a contract to perform certain works upon what is known as the Leamington cut-off for the Oregon Short Line Railway Company; that defendants, as such contractors, entered into a contract with D. W. Catts, H. R. Catts and G. H. Harvey to do a certain portion of the work. Thereafter said subcontractors, Catts & Co., entered into an agreement with plaintiffs to the effect that Faris & Kesl was to pay plaintiffs the amount of time checks issued by Catts & Co. during the month of June, 1902, amounting to \$896.30, and that Ercanbrack & Co., in consideration thereof, was to furnish Catts & Co. the necessary groceries and provisions to carry on the work and to take care of the pay-rolls of Catts & Co. In this contract Faris & Kesl joined. This is the contract on which plaintiffs base their first cause of action. Thereafter, and on the eighth day of October, 1902, the plaintiffs entered into a contract with Catts & Co. to the effect that the plaintiffs herein purchased the entire outfit of Catts & Co. and

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agreed in said contract to complete the contract of Catts & Co., and were to have all compensation thereafter accruing under said contract of Catts & Co. with Faris & Kesl. This contract is plaintiffs' exhibit "C." We will quote enough of this contract to show the relative claims of the parties under it. It says:

"Whereas second parties became and are justly indebted and owing to first parties in the sum of \$9,367.40, and whereas at hand for said sum the second parties have this day sold and delivered to first parties certain chattels and property consisting of a camping and grading outfit with tents and stores at work upon the Oregon Short Line Railway, near said Silver City, more particularly described in a certain bill of sale of even date herewith by said second parties and made, executed and delivered to first parties, and, whereas, said second parties have partially completed a contract for grading a certain portion of the roadbed of said railway under the direction of Faris & Kesl.

"Now, therefore, these presents are to witness that first parties shall, with said property, complete and finish said grading contract according to the terms thereof and shall collect from said Faris & Kesl all compensation therefor hereafter accruing, and shall apply said compensation so collected as follows."

The difficulty seems to be to ascertain the true meaning of the words "hereafter accruing" as used in the contract. Ordinarily, it seems to me that the word "hereafter" has a distinct meaning in our language and pertains to something that will occur in the future. "Accrue," as defined by Webster, is "Something that accrues to or follows the property of another." He defines "hereafter" as "A future existence or state; in time to come or some future time or state." It seems to me under the conditions existing in this case and the reasons for the contract—exhibit "C"—there should not be much difficulty in ascertaining what the words "hereafter accruing" were intended to convey. D. W. Catts & Son & Co. disposed of their grading outfit to the plaintiffs in this action, plaintiffs agreeing to complete the work then in progress under a contract between D. W. Catts & Son & Co. with defendants Faris & Kesl. Under all the

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contracts only ninety per cent of the contract price was to be paid, ten per cent being retained until the work should be finally completed and accepted by the designated officer of the railway company. It is stated in exhibit "C" that said parties—meaning D. W. Catts & Son & Co.—have partially completed a contract for grading a certain portion of the roadbed of said railway. Then follows the obligation of the plaintiffs in this action, to wit: "Respondents have to complete and finish said grading contract according to the terms thereof, and shall collect from said Faris & Kesi *all compensation therefor hereafter accruing,*" etc. If D. W. Catts & Son & Co. intended appellants to convey to respondents the ten per cent theretofore earned and retained by the original contract, exhibit "A," where was the necessity for the words in the contract, exhibit "C," "hereafter accruing"? If it was the intention that this ten per cent was to go with the contract, the natural and reasonable language of the contract would have been, "All compensation earned or accruing under the contract." As we construe the words "hereafter accruing," they were inserted in the contract for the express purpose of retaining for D. W. Catts & Son & Co. the money theretofore earned, the plaintiffs only to have such benefits of the assigned contract as they earned from the time they assumed control of the works.

The word "therefor" as used in this contract, we think, serves to explain the intention of the parties to it. Webster defines the meaning of this word to be "for that, or this, or it." As used in the contract, we construe it to refer only to work to be performed by the respondents under the contract, and has no application to work already performed by appellants under the contract.

It is conceded that the only question before us for determination is the construction of the contract, exhibit "C." For this reason we do not pass upon the other assignments of error. The judgment is reversed with costs to appellants.

Ailshie, J., and Sullivan, J., concur.

Opinion of the Court—Ailshie, J., on Rehearing.

ON PETITION FOR REHEARING.

(March 9, 1905.)

AILSHIE, J.—The respondents have filed their petition for a rehearing in this case, in which they urgently insist that the court has not given that clause of the contract discussed in the original opinion a proper interpretation and construction. The question most seriously urged is that the meaning given to the words "hereafter accruing" is not approved by the leading and recognized lexicographers, nor has it received judicial sanction where the same has come under the consideration of the courts. The sentence which has caused so much discussion and controversy in this case is quoted in the original opinion, and is as follows: "Now, therefore, these presents are to witness that first parties shall, with said property, complete and finish said grading contract according to the terms thereof and shall collect from said Faris & Kesi all compensation therefor hereafter accruing, and shall apply said compensation so collected as follows."

We shall analyze this sentence briefly for the purpose of ascertaining, if possible, the literal meaning thereof within the usually accepted definitions of the language employed. "Therefor," as used immediately following the word "compensation," evidently refers back to the expression, "complete and finish said grading contract," and must necessarily mean that Ercanbrack & Company shall have all compensation for "completing and finishing said grading contract." The word "hereafter" means, "after this time; in future time." The word "accrue," when used as a verb, is defined by the 1904 edition of Webster's International Dictionary as meaning, "to increase; to augment." The Century Dictionary defines it, "to grow; increase; augment." Soule, in the 1902 edition of his Dictionary of English Synonyms, gives the word "accrue," when used as a verb, as synonymous with "result, proceed, come, arise, issue, follow, flow, ensue, be added, be derived, be gained, be got, come in, accumulate." Black, in his Law Dictionary, defines the word "accruing" as meaning, "Inchoate, in process of maturing. That which will or may at a future time, ripen into a vested right, an available demand, or an existing cause of action." In 1

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Cyclopedia, 503, "accrue" is defined as meaning, "To arise; to grow to or to be added to; to occur." See, also, 1 American and English Encyclopedia of Law, 479; 1 Words and Phrases Judicially Defined, 101.

It will be seen from the foregoing definitions that the current and accepted meaning of the word "accruing" would be "resulting, arising, or augmenting." While the word when used in the participial form—"accruing"—means something taking place in the present and at the very time the word is used, in this instance the contracting parties limited its operation, upon this contract, in modifying it by the word "hereafter," an adverb of time, thereby restricting the compensation to be collected to that alone "accruing" *after* the execution of the contract. Therefore, the "accruing compensation" which respondents might recover under this contract is that only which began "resulting or arising" after the execution of the contract.

The ten per cent which was withheld from time to time on the contract was constantly *accumulating*, and at the end of each month after the estimates were made by the engineer, that amount had been earned as fully and completely as had the ninety per cent which was payable, but was retained as a security for the completion of the contract. It is fair under the definition of this word to say that this ten per cent which was being retained was a constantly "accruing" indebtedness, which would finally "accrue" upon the completion of the contract. Yet, as before stated, Ercanbrack & Company's right of recovery of such compensation was limited to that "accruing" in the future and impliedly denied to that which had been "accruing" up to the date of the contract.

A somewhat similar judicial view has been taken of this word in the following authorities: *Gross v. Partenheimer*, 159 Pa. St. 556, 28 Atl. 370; *Emerson v. Steamboat Shawans City*, 10 Wis. 433; *Strasser v. Staats*, 35 N. Y. St. Rep. 789, 13 N. Y. Supp. 167; *Richards v. Bellingham Bay Land Co.*, 54 Fed. 209, 4 C. C. A. 290.

Respondents in their petition for rehearing complain of the failure on the part of the court to consider their objection to the right of appellants to defend in this action on the grounds

Points decided.

that appellants do not claim the money sued for themselves, but allege that it is owing to D. W. Catts & Sons & Co., or their assigns. There is no merit in this contention, for the reason that it was incumbent upon the plaintiffs to recover upon the strength of their own cause of action, and unless they are able to show that the defendants are indebted to them they cannot recover, and it makes no difference how much the appellants may be indebted to other persons for this service.

Petitioners also call our attention to the fact that they should not be held for the entire costs, since they were entitled to recover some judgment in the lower court upon any theory of the case. This appears to be true, but it did not lessen the necessity for the defendants appealing in order to correct the error committed against them by the trial court in instructing the jury that the plaintiffs were entitled to recover the ten per cent retained as well for the work done by D. W. Catts & Sons & Co., as by the appellants. The question raised by respondents as to costs might, and probably will, appeal to the trial judge upon a further hearing in this case in taxing costs, but here we only award the cost of the appeal, and with the costs of the lower court we have nothing to do on this appeal.

For the foregoing reasons the petition will be denied.

Stockslager, C. J., and Sullivan, J., concur.

(January 28, 1905.)

STATE v. ADAMS.

[79 Pac. 398.]

BOUNTY LAW—FRAUDULENT CLAIM AGAINST COUNTY—PROOF—CONSUMMATION OF CRIME.

1. It is a well-recognized principle of criminal jurisprudence that proof of certain facts may lead irresistibly to the presumption that an act of which there is no direct proof was committed.

2. Where it is shown that certain means were adopted to attain a certain end, and the end in itself was attained, a completion of the act will be presumed.

Argument for Appellant.

3. Under the provisions of section 6385, Revised Statutes, it is not required that a fraudulent bill against a county be allowed or paid before a conviction can be had, and it is no defense that the ears of the animals for which bounty was claimed were spurious and easily detected by the board of commissioners. In such case it does not require that the ears be genuine.

4. The provisions of section 1760b, Revised Statutes, have been superseded by act approved March 11, 1901, as to the animals named in the latter act.

5. Under the provisions of an act approved March 11, 1901 (Sixth Sess. Laws, 205), one may swear to his claim against the county for bounty before anyone in the county authorized to administer oaths, and on the presentation thereof with the ears, and whatever part of the pelt that the board of county commissioners may require, if such claim is valid, the board is authorized to allow it.

6. The fourth section of said act approved March 11th, *supra*, in regard to the making of false affidavits, was not intended to, and does not, supersede the provisions of said section 6385, but is a separate and distinct crime from the one referred to in that section.

7. Under the provisions of section 6385, when a false or fraudulent claim, with intent to defraud the county, is presented to the board for the purpose of procuring its allowance, the crime specified in said section is consummated.

(Syllabus by the court.)

APPEAL from the district court of Fremont County. Honorable J. M. Stevens, Judge.

Defendant was convicted of presenting a false and fraudulent claim against Fremont county, and was found guilty and sentenced to a term of one year in the state penitentiary. Judgment affirmed.

The facts are stated in the opinion.

Hamer & McConnell and Chalmers & Jones, for Appellant.

The only proof against the defendant is that he made the affidavit of a claim under the bounty law, on June 12, 1902, at Market Lake, not a word showing or tending to show that he directly or indirectly, in person or by mail or otherwise, presented or caused to be presented, or participated in presenting, said alleged claim to any board or officer whatever, and it must

Argument for the State.

be borne in mind that the gist of this action is the presentation of a false and fraudulent claim to a public board or officer. The rules relating to false pretenses and cheats are applicable here. The presentation of false accounts is false pretenses. (7 Am. & Eng. Ency. of Law, p. 754.) To authorize a conviction it must be shown that the prisoner knew the representations actually made to be false and that he intended to defraud. (*Sharp v. State*, 53 N. J. L. 511, 21 Atl. 1026; *People v. Wakely*, 62 Mich. 297, 28 N. W. 871; 6 Lawson's Criminal Defenses, pp. 1033-1035; citing *Bracey v. State*, 64 Miss. 26, 8 South. 165.) The representation must not be obviously false, else no recovery or conviction can be had. (2 Wharton's Criminal Law, sec. 2129; *Shaffer v. State*, 82 Ind. 221; *Miller v. State*, 73 Ind. 88; *State v. Orvis*, 13 Ind. 569; *Johnson v. State*, 11 Ind. 481; *State v. Magee*, 11 Ind. 154; *Commonwealth v. Grady*, 13 Bush, 285, 2 Am. Cr. Rep. 105, 26 Am. Rep. 192; *People v. Williams*, 4 Hill, 9, 40 Am. Dec. 258; *People v. Stetson*, 4 Barb. 156; *Dord v. People*, 9 Barb. 674; *Scott v. People*, 62 Barb. 73; *People v. Crissie*, 4 Denio, 528; *Long v. Warren*, 68 N. Y. 432; *People v. Haynes*, 14 Wend. 546, 28 Am. Dec. 530; *State v. Simpson*, 2 Hawks (9 N. C.), 460; *Commonwealth v. Hutchens*, 1 Pa. L. J. Rep. 302, 2 Pars. Cas. (Pa.) 309; *Commonwealth v. Toolson*, 2 Pars. Cas. (Pa.) 326; *State v. Stroll*, 1 Rich. (S. C.) 244; *Delaney v. State*, 7 Baxt. 28; *Buckalew v. State*, 11 Tex. App. 352; *Commonwealth v. Houghey*, 3 Met. (Ky.) 223; *State v. Young*, 76 N. C. 258.) In cases of this character, the statute, being highly penal, is to be strictly construed. (Bishop on Statutory Crimes, 2d ed., secs. 193, note 3, 199; 4 Am. & Eng. Ency. of Law, pp. 643, and citations.)

John A. Bagley, Attorney General, for the State.

The defendant is prosecuted for presenting a false claim for payment and not for obtaining money under false pretenses. (Rev. Stats., sec. 6385; *Hauck v. State*, 45 Ohio St. 439, 14 N. E. 92.) Presenting false claims to public officers is an offense of a kindred nature to false pretenses and cheats, but is an entirely separate and distinct offense. (12 Am. & Eng. Ency. of Law, 853.) Section 1760b of the Revised Statutes is a gen-

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eral law in regard to the presentation of claims for bounties, but this claim was presented for the bounty offered on coyotes by an act found in Session Laws of 1901, page 205. While the statute involved in this case has nothing to do with the obtaining of money or property, but the gist of the crime, as counsel for appellant admit, is the *presentation* of the bill. Even the first authority cited by appellant bears us out in this contention. (7 Am. & Eng. Ency. of Law, p. 754; *Roberts v. People*, 9 Colo. 458, 13 Pac. 630; Utah Rev. Stats., secs. 4083, 4397; Cal. Pen. Code, secs. 72, 532.) As to the argument of counsel for appellant that if any offense has been committed by the defendant, it is a misdemeanor and not a felony, we reply that where a criminal act constitutes more than one offense, the state and not the defendant shall elect for which offense the information shall be filed. (Bishop on Criminal Law, 8th ed., secs. 791, 792; *United States v. Grundy*, 3 Cranch, 338, 2 L. ed. 460; *Lohman v. People*, 1 N. Y. 379, 49 Am. Dec. 340; *People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122.)

SULLIVAN, J.—This case was before this court at its November, 1903, term, and was remanded for a new trial. (9 Idaho, 582, 75 Pac. 258.) On a retrial the defendant was convicted of presenting a false and fraudulent claim for \$237 as a bounty on one hundred and fifty-eight coyote scalps, which scalps were found to be spurious or manufactured. The prosecution was under the provisions of section 6385 of the Revised Statutes, which section is as follows: "Every person who, with intent to defraud, presents for allowance or for payment to any state board or officer, or to any county, town, city, ward or village board or officer, authorized to allow or pay the same if genuine, any false or fraudulent claim, bill, account, voucher or writing is guilty of a felony." An act was passed at the sixth legislative session entitled "An act providing for the killing of coyotes, lynx and wildcats," and providing a fund for the payment of the same (Sess. Laws 1901, p. 205), by which act a bounty of \$1.50 was offered for each and every coyote killed, and the defendant is charged with the crime of felony committed as follows: "That said R. D. R. Adams, on or about the thirteenth day of June,

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A. D. 1902, at the county of Fremont, in the state of Idaho, did willfully, unlawfully and feloniously with intent to defraud Fremont county, state of Idaho, present for allowance to the board of county commissioners of said Fremont county, state of Idaho, who were authorized to allow the same if genuine, a false and fraudulent claim, a statement in writing duly verified by him, on the bounty fund of said Fremont county, state of Idaho, for the sum of two hundred and thirty-seven dollars purporting to be for one hundred and fifty-eight coyote scalps, contrary to the form, force and effect of the statute in such case made and provided and against the power and force and dignity of the state of Idaho." The defendant was convicted and sentenced to a term of one year in the state penitentiary. The appeal is from the judgment and an order denying a new trial.

The first question presented by the brief of counsel for appellant is the insufficiency of the evidence to support the verdict. The evidence shows that the defendant appeared before his brother in law, who was justice of the peace, on the twelfth day of June, 1902, with a box claimed to contain the ears of one hundred and fifty-eight coyotes, and defendant's written claim against the county for the sum of \$237 was prepared by said justice of the peace, and subscribed and sworn to by the defendant. The justice then gave to him said bill or claim and the box of ears and told him to send them to the clerk of the court of Fremont county. The defendant then left with the box and bill, and some person presented a box to the postmaster at Market Lake and requested him to register the same as coming from J. W. Ayers, Market Lake, to A. M. Carter, St. Anthony, the said Carter being clerk of the court of said Fremont county. It also appears that said bill and a box of ears were received by said Carter as clerk of said court and ex-officio auditor, at St. Anthony, on the thirteenth day of June, 1902; that he received said bill in a letter that he received which showed that it was from Adams and in his favor, for bounty on one hundred and fifty-eight coyotes. It further shows that said ears were manufactured and spurious. It is further shown that a man by name of Short and the defendant were operating together in the coyote business, and that said Short manufactured coyote

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ears; that said defendant took from said Short a cigar-box full of said spurious ears. It appears that said defendant requested a man by the name of Price to turn into the county some ears for him and he refused to do it, and told the defendant that they were spurious ears, and defendant thereupon assured him that there was no danger, that he had turned in several batches of them and had come out all right and had not got caught, and that he would stand the expense if said Price got caught. The defendant had a conversation with the deputy sheriff on the day that he was arrested for said crime, and said that inasmuch as he had received no money for the scalps he had sent up, he wanted to know if the matter could not be fixed up by his relinquishing any claim for the money from the county, and that if it could be fixed up that way he would relinquish any claim and have the matter dropped. He asked what the penalty would be if he plead guilty to the charge. After a careful examination of the evidence, we are fully satisfied that the verdict is amply supported by it; that it shows beyond a reasonable doubt that the defendant presented for allowance to the board of county commissioners of Fremont county the claim referred to and set forth in the information with intent to defraud the county.

It is contended that the only proof against the defendant is that he made the affidavit of the claim under the bounty law on June 12, 1902, at Market Lake, and that there is not a word showing or tending to show that he, directly or indirectly, in person or by mail, presented or caused to be presented, or participated in presenting, such claim to any board or officer whatever. That contention is not sustained by the evidence, as the evidence shows that the defendant appeared before a justice of the peace and requested the justice to prepare a claim for him for bounty on one hundred and fifty-eight coyotes, and also at the same time produced a cigar-box containing one hundred and fifty-eight scalps or ears. The justice thereupon prepared the claim and affidavit, and the defendant then and there signed and swore to the claim, and the claim with the box of ears was returned to the defendant by said justice and the justice thereupon told him to send them to the clerk of the court in Fremont

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county. The defendant thereupon took said claim and box of ears, and he, or someone else presented the same to the postmaster at Market Lake, and requested him to register the same to the clerk of the court at St. Anthony, which he did, and it appears that said claim, or bill, and box of ears, were received by said clerk on the thirteenth day of June, 1902; that said bill was received in a letter to said clerk, which showed that it was from Adams, and in his favor, for bounty on one hundred and fifty-eight coyotes. While the postmaster testified that he could not recollect who presented the box for registration, it is shown that on the twelfth day of June, the defendant swore to the affidavit and took the box of ears from the justice, and that on that day said claim and the box of ears were sent from Market Lake to said clerk. The evidence on that point is amply sufficient to show that the claim was presented to said board by the defendant. It is a well-recognized principle in criminal jurisprudence that proof of certain facts may lead irresistibly to the presumption that another act, of which there is no direct proof, was committed or done. It is presumed that regular and ordinary means are adopted for a given end, so where means calculated to attain a certain end appear to have been adopted and the end itself attained, a completion of the act will be presumed. (*Roberts v. People*, 9 Colo. 458, 13 Pac. 630; 1 Phillips on Evidence, *599-610.)

In the case before us, the end in view, to wit, the presenting of the claim, was attained. The means adopted involved several steps, all of which were established by direct proof, except that it was not proven who presented the box of ears to the postmaster in order to have it registered and sent to the clerk of the board and mailed the letter to the clerk of the court. However, the admissions of the defendant to the deputy sheriff as above set forth shows beyond a reasonable doubt that he was instrumental in having said claim presented for allowance with intent to defraud the county. It is urged that the ears admitted in evidence were spurious; that the fraud was detected by the county commissioners, and that the bill was not allowed and was never paid, and for that reason the defendant is not guilty. It is not requisite under the provisions of section 6385 that the

fraudulent bill be allowed or paid before a conviction can be had. It is there provided that every person "who with intent to defraud, presents for allowance . . . any false or fraudulent claim, bill, account, voucher or writing, is guilty of a felony." It is the presenting of a false or fraudulent claim with intent to defraud that constitutes the crime. The offense is consummated when that is done. In *Hauck v. State*, 45 Ohio St. 439, 14 N. E. 92, the court said: "When the false and fraudulent claim was presented by him to this board for the purpose of procuring its allowance, the crime for which he was indicted was consummated." The presenting of a false or fraudulent claim to a board of county commissioners for its allowance may be of a kindred nature to false pretenses and cheats, but it is an entirely separate and distinct offense. It is shown that the bill or claim was fair and regular on its face; but it is contended that as the ears were spurious, and were easily detected by the board of commissioners, that for that reason the defendant was not guilty. We are unable to consent to that contention as the presenting of a false claim with intent to defraud is the gist of the offense. The easy detection of the spurious ears will not purge the act of crime.

It is contended under the provisions of section 1760b, Revised Statutes, that the county commissioners were not authorized to allow claims against the bounty fund unless such claims were accompanied with the scalps of the animals, and as only the ears and not the scalps accompanied this claim, the defendant was not guilty for that reason. The provisions of that section are no longer applicable in case of claims and demands for bounty on the wild animals enumerated and designated in an act of March 11, 1901, entitled "An act providing for a bounty for the killing of coyotes, lynx and wildcats, and providing a fund for the payment of the same." (See Sess. Laws 1901, p. 205.) The provisions of section 1760b have been superseded by the provisions of sections 2 and 3 of the act above cited.

It is contended that it was not contemplated or intended by the legislature in the enactment of the law approved March 11, 1901, *supra*, that false and fraudulent claims against the scalp fund were crimes under the provisions of section 6385, for the

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reason that section 4 of said act provides for the punishment of persons filing false affidavits, under the provisions of said act. We cannot agree with that contention, as the latter act makes it a crime to make a false affidavit to a claim against the bounty fund, while the provisions of section 6385 make it a felony for anyone to present with intent to defraud, a false or fraudulent claim against the county; and in the case at bar, a false and fraudulent claim was presented, and this prosecution is for that crime and not for making a false affidavit. The state might have prosecuted the defendant for making a false affidavit, but it did not do so, but prosecuted him for presenting a false and fraudulent claim against the county.

We find no errors in the record, and the judgment is therefore affirmed.

Stockslager, C. J., and Ailshie, J., concur.

(January 31, 1905.)

WILSON v. VOGELER.

[79 Pac. 508.]

PRINCIPAL AND AGENT—TELEPHONE COMMUNICATION—CONTRACT MADE BY TELEPHONE—SUBSTANTIAL CONFLICT IN EVIDENCE—HEARSAY—INSTRUCTIONS.

1. *Held*, in this case that there is not a substantial conflict in the evidence and that the evidence is not sufficient to sustain the verdict.

2. A conversation between respondent and one G. in regard to whether the latter could handle certain seed at a certain price, *held* hearsay and incompetent.

(Syllabus by the court.)

APPEAL from the District Court of the Fifth Judicial District. Honorable Alfred Budge, Judge.

Action to recover damages for violation of a contract. Verdict and judgment for the plaintiff. Judgment reversed.

Argument for Respondent.

The facts are stated in the opinion.

F. S. Dietrich, for Appellant.

The making of this contract was not within the scope of Martin's authority, or apparent authority. He was merely what is ordinarily called a commercial "drummer." He was recognized as such by the plaintiff. As such an agent he has no authority to make the contract in question. The general rule is that a drummer or commercial traveler has authority only to take orders subject to the approval of his principal. (*John Matthews' Co. v. Rena*, 22 Ky. Law Rep. 1528, 61 S. W. 9; *Clough v. Whitcomb*, 105 Mass. 482; *Bensberg v. Harris*, 46 Mo. App. 404.) The second assignment involves the ruling of the court in permitting the plaintiff to detail a conversation between himself and one H. L. Griffin at Ogden when the plaintiff was not present. (1 Greenleaf on Evidence, par. 467.) The plaintiff knew and was advised by Martin himself that he (Martin) could not make this contract without authority from the defendant. The plaintiff knew that if he dealt with Martin and made such a contract, it would be worthless and not binding upon the defendant, unless Martin first procured express authority to execute it. The plaintiff knew that such authority, if procured at all, was procured by telephone. He took his chances in getting his authority in that way. There could be no valid contract under such circumstances; nor could there be any valid authorization to make such a contract, if such a mistake was made. It was for the jury to find whether there was a mistake or not, but it was for the court to advise the jury of the effect of such mistake, so that they could find their general verdict intelligently. As to the effect of such mistake, see Clark on Contracts, p. 288; 20 Am. & Eng. Ency. of Law, 2d ed., pp. 809, 811.

Holden & Holden, for Respondent.

Those dealing with an agent are entitled to presume that his agency is general. (*Trainer v. Morrison*, 78 Me. 160, 57 Am. Rep. 790, 3 Atl. 185.) Nowhere in the record does it appear that prior to or at the time the contract in question was made,

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respondent had even seen any of appellant's letterheads or order blanks. Nor does it appear that respondent had knowledge of the limitations appellant claims to have put upon his agent's authority. The rule of the law is that the rights of third parties who have reasonably and in good faith relied upon the apparent authority of the agent cannot be prejudiced by secret limitations or restrictions upon it of which they had no notice. (Mechem on Agency, secs. 279, 708; *White Lake L. Co. v. Stone*, 19 Neb. 402, 27 N. W. 395; *Keith v. Hirschberg Optical Co.*, 48 Ark. 138, 2 S. W. 777.) A party may testify to that portion of the conversation over a telephone which is spoken in his presence, although he could not hear the replies and did not know with whom the conversation was held. (*Miles v. Andrews*, 153 Ill. 262, 38 N. E. 644; 1 Johns on Evidence, sec. 210; *Wolf et al. v. Missouri Pac. R. Co.*, 97 Mo. 473, 11 Am. St. Rep. 331, 11 S. W. 49, 3 L. R. A. 539-542; *McCarty v. Peach*, 186 Mass. 67, 70 N. E. 1029, and cases cited.)

SULLIVAN, J.—This action was commenced by respondent against appellant, who was then doing business as the Vogeler Seed and Produce Company, at Salt Lake City, Utah, to recover \$1,295 damages on account of the failure of the defendant to deliver fifty thousand pounds of alfalfa seed in accordance with an alleged written contract or agreement dated January 15, 1901. The principal issue presented by the pleadings, and especially by the evidence, was whether or not said agreement was authorized by the defendant, and therefore binding upon him. The case was tried by the court with a jury and a verdict for \$625 was rendered in the plaintiff's favor. Thereafter the court overruled a motion for a new trial, and the appeal is from the judgment and order denying a new trial. The alleged contract is signed by the respondent and is executed on behalf of the appellant by one S. H. Martin, who was the agent of the appellant, and the main issue was whether or not Martin was authorized by the appellant to execute said contract. Five errors are assigned. The first is that the evidence is insufficient to justify the verdict. It appears from the evidence that S. H. Martin, who signed the contract referred to on behalf

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of the appellant, had been employed by the appellant to solicit orders upon commission for the appellant. It also appears that all orders taken by him were subject to appellant's approval. It also appears that respondent was advised before the contract in question was executed that said Martin had no general or implied authority to sign said contract, and at that time he told the respondent that he could not close the deal, and that he would telephone the appellant and let him know whether the appellant would permit him to enter into such a contract. But it is contended on the part of the respondent that the appellant conversed with said Martin by telephone, in which conversation he authorized said Martin to make said contract. The respondent testified that said Martin put in his call at the telephone office and after getting the appellant the door of the telephone booth was left wide open and that Martin told Vogeler, the appellant, that he had a chance to sell fifty thousand pounds of alfalfa seed, Purity brand, \$125 to be paid down and the balance to be paid in sixty days; that Martin said: "Will I sell it? Don't say no." That when he left the telephone booth he said, "All right, come out and we will make the contract," and that they went to an attorney and had him draw up a contract and it was signed and he gave Martin his check for \$125.

Lee Hughes testified that he was telephone operator in the telephone office at Idaho Falls on the 15th of January, 1901, when the respondent and Mr. Martin were there, and that he heard a part of the conversation between Martin at Idaho Falls, Idaho, and Vogeler at Salt Lake City, Utah; that he heard Martin say that he had sold fifty thousand pounds of seed, and the man at the other end said it was all O. K. That when he put the call in he placed the call for Vogeler of the Vogeler Seed and Produce Company. That he came to hear the conversation because an operator on the telephone line has to break in at times to see whether anyone is interrupting and to keep the line clear for the parties talking. On cross-examination he testified that he heard Martin say: "I have sold fifty thousand pounds of seed," and Vogeler replied that it was all O. K.; that he did not say five thousand pounds; he said fifty thousand pounds; that the telephone booth door was open while Martin

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was talking and that he, witness, broke in on the line once or twice; that he heard the conversation when he broke in on different occasions; that he didn't exactly remember what he heard the first time he broke in, and that the conversation between Martin and Vogeler lasted about two minutes; that he broke in twice; that ten or twelve seconds elapsed between the time the fifty thousand pounds of seed were mentioned and the time the answer came, and that he did not hear what passed between them during that time; that he had no particular interest in listening and that he just happened to hear what he did; that he didn't know what was said in addition to what he had testified to; that they talked about two minutes and it is possible Martin may have said, "I can sell fifty thousand pounds and also five thousand more," and that between the time that Martin said fifty thousand pounds and the time that witness heard the reply there was time enough for him to have made that remark; that he didn't hear Martin say anything about five thousand pounds.

Miss Toronto, who was stenographer in Vogeler's office, at the time said telephone conversation took place, testified that she remembered the conversation between Vogeler and Martin at that time, as she was required to stop typewriting while the conversation took place; that she heard Mr. Vogeler say to the person speaking that "You are not to sell fifty thousand pounds of alfalfa seed at eight cents per pound, or any other price; we have not that amount of seed for sale and could not deliver that quantity of seed." He further said that the party talking could sell five thousand pounds at eight cents, if the party would pay \$125 cash, but that he could not deliver more than that amount. That there was received at the office of defendant on January 16, 1901, a check for \$125 with a contract for the delivery of fifty thousand pounds of alfalfa seed, and that the check was immediately returned to Mr. Wilson on the same date that the letter from the plaintiff was received. The following is a copy of the letter:

"Salt Lake City, Utah, Jan. 16, 1901.

"Thomas C. Wilson, Esq., Idaho Falls, Idaho.

"Dear Sir: Yesterday Mr. S. H. Martin telephoned us, saying that he had a chance to sell five thousand pounds of alfalfa

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seed and that party would deposit on same \$125, to which we answered him that he may do so, and were greatly surprised this morning to be in receipt of the enclosed contract, which says fifty thousand pounds. Our Mr. Martin knows fully well that we have not this amount of seed in stock, and therefore would not care to contract for seed that we have not in our possession. Therefore are obliged to herewith return contract and check. We have five thousand pounds of this Purity brand in stock and should this be what you desire, please let us know and we will hold this amount for you. It would be a difficult matter to gather up fifty thousand pounds of as good a quality as our Purity brand, of which you have already sample.

"Kindly advise if this is agreeable to you, and we will hold five thousand pounds of Alfalfa Purity, subject to your order, on payment of \$125 thereon.

"Very truly yours,

"VOGELER SEED AND PRODUCE CO."

H. W. Smith testified that he was bookkeeper for the appellant at the time said telephone conversation took place and was present at the time and heard what Vogeler said at the phone; that in that conversation Vogeler said that Martin must not sell fifty thousand pounds of seed at eight cents per pound because he did not have it; that he gave him permission to sell five thousand pounds at eight cents for delivery within sixty days provided \$125 was deposited; that he said not to sell more than five thousand pounds as the price had not only advanced as per his telegram of the 13th inst., but that he did not have the seed on hand to sell; that a check and contract was received at the office on January 16th, and on the same day returned to the appellant, accompanied by the letter above quoted.

Vogeler testified in his own behalf that he had a conversation by telephone with Martin on the fifteenth day of January, 1901; that he knew Martin's voice; that Martin said in that conversation that he had a chance to sell fifty thousand pounds of alfalfa seed, Purity brand, and that witness replied for him not to sell fifty thousand pounds or any part thereof upon those terms; that he did not have that much stock at that time; that

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Martin then said: "Can I sell five thousand pounds?" And witness said, "yes," and Martin replied that it was to the Z. C. M. I.; that witness replied that upon the payment of \$125 that would be O. K., and that was all that was said.

The above is the substance of all the evidence as to the conversation that occurred over the telephone. We there have the positive statements of Vogeler, Smith, the bookkeeper, and Toronto, the stenographer, that Vogeler didn't authorize Martin to sell fifty thousand pounds of seed, and against this we have the testimony of the telephone operator and the respondent. The operator admits that he didn't hear all of the conversation which covered a period of about two minutes, and that during that time he broke in on the line twice. And further, the check of \$125 received by appellants was immediately returned to the respondent. The respondent only heard what Martin said and did not hear what Vogeler said over the phone. Their testimony shows that they only heard a part of what was said. It would be a dangerous rule to hold that the minds of the parties had met on a proposition to sell and purchase with only the statements made by one party over a phone. It is true the statements made by Martin would indicate that appellant authorized him to make the contract. They also indicate that Martin was very anxious to make it, no doubt to earn a commission. What Martin said in that telephone conversation as testified to by respondent and the telephone operator does not preponderate over the positive testimony of appellant and his witnesses, Smith and Toronto. Inference and surmise are not sufficient to overcome the positive testimony in the case. I think that observation and experience show that mistakes are liable to occur in telephone conversations and misunderstandings arise between the persons talking, and the chances for a third party to fully understand such conversations, they only hearing what was said at one end of the line, is considerable.

And again, fifty thousand pounds of seed at eight cents per pound would amount to \$4,000. This seed, according to said alleged contract, was to have been delivered within sixty days on the payment of \$125 as a forfeit. This is an advance of less than one-third of a cent per pound on said seed, and when it

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comes to the probabilities, it is hardly probable that a good business man would make such a contract where the subject of the contract was so liable to fluctuation in price during the sixty days' option to deliver said seed. A \$125 payment on a five thousand pound sale would be more probable. But we do not have to go into the realm of probabilities to decide this case.

We do not think there is a substantial conflict in the evidence on the point as to whether Vogeler authorized Martin to make the alleged contract, while an inference might be drawn from the testimony of the telephone operator and the respondent that Martin was authorized to sign said contract, but when the testimony of the appellant, his bookkeeper and stenographer is considered, we do not think there is a substantial conflict as the positive testimony clearly overbalances the inference to be drawn from the testimony of the respondent.

The second error assigned involves the ruling of the court in permitting the respondent to detail a conversation between himself and one H. L. Griffin of Ogden, Utah. That evidence was clearly incompetent; it was purely hearsay, and the court erred in admitting it. After it was admitted, simply because counsel for the appellant cross-questioned the witness did not cure the error or make it complete. The order of the court refusing to strike out the testimony of witness Hughes as to what he heard over the telephone is assigned as error. It is true that Hughes himself testified that he heard only fragments of the conversation; that he broke in on the line twice during the two minutes that said conversation lasted, and admits that he may not have heard all the conversation, but we think it was proper that the part of the conversation heard by him should go to the jury.

The refusal of the court to give defendant's instruction number four and one-half is assigned as error. Said instruction is as follows: "The court instructs the jury that if on the fifteenth day of January, 1901, at Idaho Falls, Idaho, S. H. Martin telephoned the defendant Vogeler, at Salt Lake City, Utah, that he could sell fifty thousand pounds of alfalfa seed at eight cents per pound and if the defendant telephoned S. H. Martin not to sell fifty thousand pounds of Purity alfalfa seed, but that he could sell five thousand pounds of Purity alfalfa seed, at

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eight cents per pound, and by mistake S. H. Martin understood the defendant Vogeler to say fifty thousand pounds, when he only said five thousand pounds, the plaintiff cannot recover in this action, and you should find for the defendant." We are not satisfied that the court erred in refusing to give said instruction, and the court is not agreed as to whether said instruction is the law under the pleadings and evidence in the case, and therefore hold that the court did not err in refusing to give it.

There is some contention in the record and some evidence whereby it is attempted to be shown that Martin had authority to bind the appellant in contracts for the sale of seed without his submitting such contracts to him, and under the evidence contained in the record, we think that the court erred in not giving said instruction. The plaintiff well knew that the authority of Martin to make said contract was procured by telephone, if procured at all, and if the testimony of said Vogeler, Smith and Toronto is to be believed, no such authority was conferred, and the fact would remain that Martin acted without authority whether from misunderstanding or from the desire to earn a commission. It will not be seriously contended that if the minds of the parties in this case did not meet or come together, they did not agree, and no contract was entered into. The judgment must be reversed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion. It is so ordered, with costs in favor of appellant.

Stockslager, C. J., and Ailshie, J., concur.

Statement of Facts.

(February 6, 1905.)

MURRY v. NIXON.

[79 Pac. 643.]

SUFFICIENCY OF COMPLAINT—CERTAINTY OF FINDINGS—DESCRIPTION OF PROPERTY IN DISPUTE.

1. Complaint in this case examined and held sufficient to state a cause of action; and no defect therein having been pointed out by demurrer in the lower court, any defect in the manner of stating the cause of action will not be examined on first suggestion in this court.

2. A judgment will not be reversed on the grounds alone that the findings on which it rests refer to maps and plats on file in the case for a complete and definite description of the property involved in the litigation, but when capable of being made certain by such reference will be sustained.

3. *Held, further*, that the practice of referring in findings and judgments to extraneous matters for description or other essential matter is not the commendable practice and should be discouraged.

(Syllabus by the court.)

APPEAL from the District Court of the Fifth District, in and for Bannock County. Honorable Alfred Budge, Judge.

Action to quiet title to certain property and for a perpetual injunction against the defendant interfering with plaintiff's possession or obstructing the free use of such property. Judgment for plaintiff and defendant appeals. Affirmed.

STATEMENT OF FACTS.

The plaintiff commenced this action to quiet his title to certain property situated in Bannock county, and to obtain a perpetual injunction against the defendant interfering with plaintiff's possession of such property or in any manner obstructing the free use thereof. Since this appeal is from the judgment alone and does not bring up any of the evidence, and appellant places his chief reliance upon the insufficiency of the complaint, we therefore quote the complaint and findings in full, which are as follows:

Statement of Facts.

"Comes now the plaintiff and for cause of action against the defendant, complains and alleges:

"1st. That the plaintiff and his grantors and predecessors in interest, at all the times herein mentioned, were, and the plaintiff now is, the owner, in the possession and entitled to the possession of the following described real estate, to wit:

"That certain water right and water system furnishing and supplying the city of Pocatello, Idaho, with water for public and domestic use commonly known as the Pocatello Water System, including, among other things, the right of way for its pipe-lines from its source of supply to its reservoirs, reservoir sites, with the right of access thereto, and the right of way for its pipe lines from said reservoirs to the corporate limits of the city of Pocatello, Idaho; that said right of way is one hundred feet wide, and among other lands crosses one corner of the southeast quarter of the southwest quarter of section 35, township 6 south, range 34 east, in Bannock county, state of Idaho, said right of way being occupied and used for the pipe-lines of the plaintiff in conducting water of said water system to the city of Pocatello for domestic and public use as aforesaid, and has been acquired by the plaintiff and his grantors and his predecessors in interest from the government of the United States pursuant to law, and according to certain surveys, maps and plats submitted to and approved by the Secretary of the Interior of the said United States government, and now on file therein, and also with the United States land office at Blackfoot, Idaho, to which reference is hereby made as a part hereof.

"2d. That as a means of access to, and for the convenience of the plaintiff and the traveling public in traveling to and from said pipe-lines and reservoirs, the plaintiff and his grantors and predecessors in interest built and constructed a road from the city of Pocatello, Idaho, to its upper reservoir situate on the northwest quarter of the southeast quarter of section 2, township 7 south, range 34 east, which said road runs over and through the southeast quarter of the southwest quarter of section 35, aforesaid, along and adjacent to said right of way within close proximity thereto.

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"3d. That the plaintiff and his grantors and predecessors in interest, for more than ten years last past, except when interrupted by the defendant as hereinafter more fully alleged, have been and now are in the possession, occupation and use, and are entitled to the possession, occupation and use of said pipe-lines and reservoirs, claiming title thereto, holding and claiming the same adversely against all and every person or persons whomsoever, and paying all state, county and municipal taxes or assessments upon or against the same.

"4th. That the plaintiff and his grantors and predecessors in interest, for more than ten years last past, except when interrupted by the defendant, as hereinafter more fully alleged, have been and now are entitled to access to said pipe-lines and reservoirs by means of and along and over the road and highway set forth and described in paragraph 2 hereof, together with the traveling public using the same, which is the only present practical means of access to and from said pipe-lines and reservoirs, and said road and highway, except when obstructed by the defendant, has been and now is in constant daily use by the plaintiff and the traveling public.

"5th. That on or about the seventeenth day of October, 1902, the defendant above named trespassed upon said right of way of the plaintiff, by planting posts and stringing wires over and across the same, thereby obstructing and inclosing the same without the knowledge and against the will and without the consent of the plaintiff, and by his acts and speech gives out and threatens to continue to plant posts and string wires over and across said right of way where the said lines of the southeast quarter of the southwest quarter of said section 35 crosses the same, without the knowledge, against the will and without the consent of plaintiff, and to the great and irreparable damage of the plaintiff, for which there is no plain, speedy and adequate remedy at law.

"6th. That on or about the seventeenth day of October, 1902, the defendant above named, in violation of law, without the knowledge of the plaintiff and against his will and without his consent, obstructed said road and highway set forth and described in paragraphs two and four hereof, by planting posts

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and stringing wires over and across the same, thereby preventing the plaintiff and others from traveling said road and highway, and by his acts and speech the defendant gives out and threatens to continue to obstruct said road and highway and to prevent travel thereon or thereover, where the same crosses said southeast quarter of the southwest quarter of section 35 aforesaid, to the great and irreparable damage of the plaintiff, and for which there is no plain, speedy or adequate remedy at law. . .

"7th. That the defendant claims some right or interest in and to the said southeast quarter of the southwest quarter of section 35, the exact extent of which is to the plaintiff unknown, but if any interest he has, it is subordinate and inferior to the rights of the plaintiff in said right of way, and to the right of the plaintiff to travel over said road and highway constructed and used by the plaintiff and his grantors and predecessors in interest, for more than ten years last past, as a means of access to said pipe-lines and reservoirs.

"8th. That the plaintiff is informed and believes, and upon such information and belief alleges, that the defendant is a non-resident of Idaho, and has no property therein, except said southeast quarter of the southwest quarter of section 35, aforesaid, which is practically valueless, and that the defendant is therefore insolvent and wholly unable to respond in damages for the past and threatened trespasses upon the rights of way of the plaintiff, and for the past and threatened obstructions to said road and highway and the plaintiff will suffer great and irreparable damage from such threatened trespasses, unless defendant be restrained and enjoined therefrom."

After the submission of the case the court made and filed his findings of fact and conclusions of law, which are as follows:

"1st. That the plaintiff and his grantors and predecessors in interest, at all the times mentioned in the plaintiff's complaint, and the plaintiff now is the owner, in the possession and entitled to the possession of that certain water system furnishing and supplying the city of Pocatello, Idaho, with water for domestic and public use, commonly known as the Pocatello Water System, including, among other things, the right of way for its pipe-lines, aqueducts and ditches from its source of supply to its

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reservoirs, reservoir sites, with the right of access thereto, and the right of way, fifty feet wide in width on either side of the margin of said reservoir and pipe-lines and to the corporate limits of the city of Pocatello, Idaho, which right of way crosses the southeast quarter of the southwest quarter of section 35, township 6 south, range 34 east, Boise meridian, in Bannock county, state of Idaho, said right of way being used and occupied by the plaintiff with pipe-lines, conducting water of said water system to the city of Pocatello, for domestic and public use as aforesaid, and which has been acquired by the plaintiff and his grantors and predecessors in interest from the government of the United States pursuant to law, and according to certain maps, surveys and plans, submitted to and approved by the Secretary of the Interior of the United States government, now on file with said secretary and in the United States land office at Blackfoot, Idaho, and filed as exhibits in this cause, to which reference is hereby made as a part hereof.

“2d. That as a means of access to and for the convenience of the plaintiff and the traveling public in traveling to and from said pipe-lines, reservoirs, and other places beyond, the plaintiff and his grantors and predecessors in interest built and constructed a road from the city of Pocatello, Idaho, to its said reservoirs, and dedicated the same to the public as a public highway, which said road has been used by the plaintiff and accepted and used by the general public for more than ten years last past, as a public highway, which said road passes over the southeast quarter of the southwest quarter of section 35, aforesaid, along and adjacent thereto, and is fifty feet in width and accurately marked on a plat and filed herein and made a part hereof.

“3d. That the plaintiff and his grantors and predecessors in interest, for more than ten years last past, except when interrupted by the defendant, have been and now are in the possession, occupation and use of said pipe-lines and reservoirs and the rights of way and sites therefor, claiming title thereto under the laws and grants of the United States, holding and using the same adversely against the defendant and all and every person or persons whomsoever, paying all state, county or municipal taxes or assessments against or upon the same.

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"4th. That on or about the seventeenth day of October, 1902, the defendant trespassed upon said right of way for said pipe-lines by planting posts and stringing wires over and across the same, thereby obstructing and inclosing the same against the will and without the consent of the plaintiff; and at the same time and place and in the same manner obstructing said road and public highway; and by his acts and speech gives out and threatens to continue to plant posts and string wires over and across said right of way and highway, where the lines of the southeast quarter of the southwest quarter of said section 35 crosses the same.

"5th. That the defendant is a nonresident of the state of Idaho, and has no property therein, except the southeast quarter of the southwest quarter of said section 35, aforesaid, the value of which is not proved, and which is of little value.

"As conclusions of law based upon the foregoing findings of fact, the court says:

"That the plaintiff is the owner, in the possession and entitled to the possession of a strip of land one hundred feet wide through the southeast quarter of the southwest quarter of section 35, township 6 south, range 34 east, Bannock county, Idaho, where the pipe-line of the plaintiff leading from its lower reservoir to the city of Pocatello, crosses the same, being a strip fifty feet on each side of said pipe-line, as located, surveyed and established by the plats and maps filed with and approved by the Secretary of the Interior, and now on file in the United States land office at Blackfoot, Idaho, a certified copy of which is filed in this cause, to which reference is hereby made as a part hereof; and that the defendant has no right or title thereto.

"That the road leading from the city of Pocatello, Idaho, to the pipe-lines, reservoirs, reservoir sites, and places and points west thereof and particularly that part of said road which crosses the southeast quarter of the southwest quarter of section 35, whether located upon or off the right of way for said pipe-lines, is and for more than ten years last past has been a public highway, and for a width of fifty feet where said road now exists is entitled to be traveled by the general public, and for that width must be left open and unobstructed to public travel.

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"That the plaintiff is entitled to have his right and title to said right of way, fifty feet upon each side of said pipe-line, where the same crosses the lands above described, quieted against the defendant, and the plaintiff's right and title to said right of way is superior to any right or claim of said defendant.

"That the defendant has no right to plant posts or string wires over or across said right of way for said pipe-lines or said public road, or to otherwise obstruct said right of way or said public highway, or to obstruct said public highway where the same diverges from said right of way.

"That the defendant and his agents, attorneys and servants should be perpetually restrained and enjoined from in any manner interfering with or obstructing said right of way or trespassing thereon and from obstructing said public highway, where the same crosses the lands above described, or in any manner interfering with the free use and enjoyment thereof as a public highway."

The facts are stated in the opinion.

John P. Cummings, for Appellant.

Does the complaint state facts sufficient to constitute a cause of action? If it does not, then the judgment of the court will certainly fall. The allegations that the acts of the defendant have and will result in great and irreparable damage to the plaintiff are not sufficient; the complaint must show in what manner the plaintiff would be injured or in what manner he has been injured—what the result of the defendant's acts complained of has been or would be. (*Crescent Min. Co. v. Silver King Min. Co.*, 17 Utah, 444, 70 Am. St. Rep. 810, 54 Pac. 244.) A full disclosure of all facts must be made in an application for an injunction. (*Reddall v. Bryan*, 14 Md. 444, 74 Am. Dec. 550; *Rankin v. Charless*, 19 Miss. 490, 61 Am. Dec. 574; *Leach v. Day*, 27 Cal. 643.) The complaint fails to allege by what right or authority he brings this action to remove or prevent the obstruction of a public highway or public road. To entitle a private individual to maintain a suit for the obstruction of a public highway he must show that his injuries

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are different in kind from those suffered by the public. (*San Jose Ranch Co. v. Brooks*, 74 Cal. 463, 16 Pac. 250; *Hargro v. Hodgdon*, 89 Cal. 623, 26 Pac. 1106; *Blanc v. Klumpke*, 29 Cal. 156; *Bigley v. Nunan*, 53 Cal. 404; *Hogan v. Central Pac. R. Co.*, 71 Cal. 84, 11 Pac. 876.) Where the nuisance is purely public the suit can only be instituted by the state or the attorney general acting for the state. (*Yolo Co. v. Sacramento*, 36 Cal. 194; *Coburn v. Ames*, 52 Cal. 385, 28 Am. Rep. 634; *People v. Dreher*, 101 Cal. 271, 35 Pac. 867; *Stufflebeam v. Montgomery*, 3 Idaho, 20, 26 Pac. 125; Idaho Rev. Stats. 1887, secs. 960-963; *People ex rel. Brokaw v. Commrs. of Highways of Bloomington Tp.*, 130 Ill. 482, 22 N. E. 596, 6 L. R. A. 161.) That the plaintiff had a plain, speedy and adequate remedy at law is so apparent as to hardly admit of argument. (Rev. Stats. 1887, sec. 5092, subd. 2.) An injunction will not be granted when the remedy at law for the injury complained of is full, adequate and complete. (*Borland v. Thornton*, 12 Cal. 440; *Leach v. Day*, 27 Cal. 643; *Richards v. Kirkpatrick*, 53 Cal. 433; *Rahm v. Minis*, 40 Cal. 421; *Conley v. Chedic*, 6 Nev. 222; *Warlier v. Williams*, 53 Neb. 143, 73 N. W. 539; *Eidimiller Ice Co. v. Guthrie*, 42 Neb. 238, 60 N. W. 717, 28 L. R. A. 581; *Phillips v. Watson*, 63 Iowa, 28, 18 N. W. 659; *Wilkinson v. Rewey*, 59 Wis. 554, 18 N. W. 513.)

Standrod & Terrell, for Respondents.

Where an action is tried in the district court upon its merits, and a finding of facts is made and a judgment rendered thereon, no exception being taken, the only question that will be considered by the supreme court is whether the complaint states facts sufficient to warrant the judgment. (*Diehl v. Hull*, 1 Idaho, 352; *Smith v. Sterling*, 1 Idaho, 128; *People v. Hunt*, 1 Idaho, 433; *Forsythe v. Richardson*, 1 Idaho, 459; *Ray v. Ray*, 1 Idaho, 705; *Hyde v. Harkness*, 1 Idaho, 638; *Purdum v. Taylor*, 2 Idaho, 167, 9 Pac. 607; *Berry v. Alturas Co.*, 2 Idaho, 296 (274), 13 Pac. 233; *Jones v. Quayle*, 3 Idaho, 640, 32 Pac. 1134.) An appellate court will not presume error. All intendments must be in favor of the judgment. (*Lowe v. Turner*, 1 Idaho, 107; *Hazard v. Cole*, 1 Idaho, 276; *Montandon v. Walker*,

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2 Idaho, 165, (152), 9 Pac. 608; *Hopkins v. Utah N. Ry. Co.*, 2 Idaho, 300 (277), 13 Pac. 343; *State v. Preston*, 4 Idaho, 215, 38 Pac. 694; *Vermont Loan etc. Co. v. McGregor*, 5 Idaho, 320, 51 Pac. 103.) When the evidence is not before the appellate court, it will be presumed that the findings are supported by the evidence. (*Zion's Co-op. Mer. Inst. v. Morgan*, 6 Idaho, 464, 56 Pac. 168; *Brossard v. Morgan*, 7 Idaho, 215, 61 Pac. 1031.)

AILSHIE, J. (After Making the Statement).—The defendant did not demur to the complaint, but answered, and the case was tried without any objection to the sufficiency of the complaint. While this complaint may have contained defects which could have been pointed out by special demurrer, we are satisfied that it is sufficient to state a cause of action in the absence of any such objection. The views of this court on a somewhat similar objection of a more serious nature than the one involved in this case were expressed in *Hollister v. State*, 9 Idaho, 651, 77 Pac. 339. It is argued that the findings are insufficient to support the judgment, for the reason that they do not fix the exact situs or location of the right of way one hundred feet wide to which it is sought to quiet the title. The description of the premises contained in the decree follows the description contained in the findings. It will be noticed that the court refers to certain plats and maps, certified copies of which were on file in the case, for a specific and complete description of the property, and by reference, made the maps a part of the findings. Appellant's chief objection to this is that no map or plat is made a part of the findings or judgment by being incorporated therein, and that no map or plat is referred to by any identification whereby a person could ascertain the particular map or plat. A map is brought up as a part of the record by stipulation between counsel, showing the exact location of the right of way and pipe-line claimed by the plaintiff, which map is drawn to a scale and contains all the angles and measurements necessary to definitely locate the same. This map is one of the files in the case in the trial court. It is claimed, however, by appellant that there were other maps and plats on file with reference to the same tract of land and right of way, and that from

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the findings and judgment it cannot be ascertained which particular map is referred to. It is to be presumed that all the maps and plats which were properly introduced in the case had reference to the particular right of way and pipe-line in controversy, and since it could be located at but one definite place, it must necessarily follow that all the maps and plats on file in the case were in harmony with each other and gave the property the same location rather than different locations. On this point appellant cites us to *Crosby v. Dowd*, 61 Cal. 557, but what was said there with reference to description is scarcely applicable here for the reason that that was an ejectment case; but the doctrine announced in that case has been repudiated by the California court in the later cases of *De Sepulveda v. Baugh*, 74 Cal. 470, 5 Am. St. Rep. 455, 16 Pac. 223, and *In re Madera Irr. Dist.*, 92 Cal. 296, 27 Am. St. Rep. 106, 28 Pac. 272, 675, 14 L. R. A. 755. We think in this case the description is not so defective as to justify a refusal of the judgment. The practice, however, of referring to extraneous matters in the findings and judgment for definite description, or any other matter that should be contained in the findings and judgment, is one which should be discouraged. We think the trial courts should incorporate all such matters in their findings and judgments without making any reference whatever to any matters not therein contained, and by so doing much of this character of discussion and this class of appeals would be avoided.

Counsel for the respective parties have gone quite exhaustively into the question of the kind, character and extent of the title which plaintiff acquired to this right of way, and have discussed the question as to whether the same was a fee or only a specific easement. The evidence has not been brought before us, and for that reason we do not think we are at liberty to enter into a discussion of those questions. This appeal only brings up the judgment-roll, and since we find no error therein, the judgment must be affirmed, and it is so ordered. Costs awarded to respondent.

Stockslager, C. J., and Sullivan, J., concur.

Argument for Appellant.

(February 9, 1905.)

PENNYPACKER v. LATIMER.

[81 Pac. 55.]

ASSIGNMENT OF MORTGAGE—FORECLOSURE OF MORTGAGE—PAYMENT—
AGENT—ESTOPPEL.

1. Where B. executed a mortgage to the B. & E. Investment Company, and the company thereafter assigned the same to P., with a contract binding the company to pay interest installments and principal promptly when due, and agreeing not to foreclose the mortgage for two years after the same became due, and giving the company the right to repurchase said note and mortgage at any time, and collected nine interest installments covering a period of about five years through said company, and delivered the coupons therefor to the mortgagor through said corporation, and neglected to file its assignment of said mortgage for record in the proper county, and failed and neglected to notify the mortgagors of such assignment, *held*, that under those facts the said B. & E. Investment Company was the agent of P., and that the payment of said principal debt and interest to the B. & E. Investment Company was a payment to P.

(Syllabus by the court.)

APPEAL from the District Court of Ada County. Honorable George H. Stewart, Judge.

Action to foreclose a mortgage. Judgment for defendant. Affirmed.

Richards & Haga, for Appellant.

Payment of a bill or note should be made to the legal owner or holder thereof, or to the holder's general agent for the collection of such papers, or to someone having special authority to collect in the particular instance, and proof of authority to a person to collect interest does not authorize him to collect the principal. (*University Bank v. Tuck*, 96 Ga. 465, 23 S. E. 467; *Bronson v. Ashlock*, 2 Kan. App. 255, 41 Pac. 1068; 2 Daniel on Negotiable Instruments, 5th ed., sec. 1230; *Cummings v. Hurd*, 49 Mo. App. 139; *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157; *Dodge v. Birkenfeld*, 20 Mont. 115, 49 Pac.

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590; *Bull v. Mitchell*, 47 Neb. 647, 66 N. W. 632; *Draper v. Rice*, 56 Iowa, 114, 41 Am. Rep. 88, 7 N. W. 524, 8 N. W. 797; *Lester v. Snyder*, 12 Colo. App. 351, 55 Pac. 613; *Barstow v. Stone*, 10 Colo. App. 396, 52 Pac. 48; *Brewster v. Carnes*, 103 N. Y. 556, 9 N. E. 323; *Adair v. Lenox*, 15 Or. 489, 16 Pac. 182; *Kohl v. Beach*, 107 Wis. 409, 81 Am. St. Rep. 849, 83 N. W. 657, 50 L. R. A. 600; *Williams v. Walker*, 2 Sand. Ch. 325.) Where the grantee of a mortgagor who has assumed the payment of a note and mortgage pays the amount due on such note and mortgage to the original mortgagee *before the same becomes due*, but after the assignment of such note and mortgage, and after the mortgagee had parted with the possession thereof, and was without evidence of authority to receive such payment, he does so at his peril, and must bear the loss if the money is embezzled before it reaches the legal owner and holder of the note and mortgage. (*Hollingshead v. Globe Inv. Co.*, 8 N. Dak. 35, 77 N. W. 89, 42 L. R. A. 659; *Murphy v. Barnard*, 162 Mass. 72, 44 Am. St. Rep. 340, 38 N. E. 29; *Biggerstaff v. Marston*, 161 Mass. 101, 36 N. E. 785; *Mulcahy v. Fenwick*, 161 Mass. 164, 36 N. E. 689; *Schultz v. Sroelowitz*, 191 Ill. 249, 61 N. E. 92.) Authority from the holder of a note to an agent to collect and receive the principal and interest of the debt is not authority to collect or receive either the principal or interest before it is due, and the payor is not discharged if money paid before it is due is embezzled by such agent. (*Park v. Cross*, 76 Minn. 188, 77 Am. St. Rep. 630, 78 N. W. 1107; *Schermerhorn v. Farley*, 33 N. Y. St. Rep. 900, 11 N. Y. Supp. 466; *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157; Jones on Mortgages, 6th ed., sec. 964; *Biggerstaff v. Marston*, *supra*.) An acknowledgment of satisfaction of a mortgage by a mortgagee after assignment of the mortgage does not affect the rights of the assignee. (*Oregon & Washington Trust Co. v. Shaw*, 5 Saw. 336, Fed. Cas., No. 10,556; 4 Kent's Commentaries, 194; 2 Washburn on Real Property, 129; *McCormick v. Digby*, 8 Blackf. 99.) The burden of showing the existence of an agency is upon the party who alleges it, and to establish agency the evidence must be clear and convincing. (*Schmidt v. Shaver*, 196 Ill. 108, 89 Am. St. Rep. 250, 63 N. E. 655; *Ames v. Murray Mfg. Co.*, 114 Wis. 85,

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89 N. W. 836; *Angle v. Manchester* (Neb.), 91 N. W. 501.) The recording of assignment of mortgages was but briefly referred to in appellant's former brief. This question was not urged by respondent in the lower court, and we inferred that her counsel conceded that the statutes did not require the assignment to be recorded, and that the alleged payment could not be justified under any provision of the recording acts of Idaho. From the numerous allusions in the opinion heretofore rendered in this case to the failure of appellant to record his assignment, we infer that the court considered the recording thereof essential under our statutes. We feel justified, therefore, in presenting our views on this question at some length. (*Vanderkemp v. Shelton* (1844), 11 Paige, 29, 37; *Reed v. Marble* (1843), 10 Paige, 413.) The only effect of recording the assignment is to protect the purchaser against the subsequent sale of the mortgage by the apparent holder of it. (*Crane v. Turner*, 67 N. Y. 437; *Van Kueren v. Corkins*, 66 N. Y. 77; *Greene v. Warnick*, 64 N. Y. 220; *Purdy v. Huntington*, 42 N. Y. 334, 1 Am. Rep. 532; *Giling v. Maass*, 28 N. Y. 191; *Curtis v. Moore*, 152 N. Y. 159, 57 Am. St. Rep. 506, 46 N. E. 168.)

Hugh E. McElroy and D. D. Williams, for Respondent.

The respective rights of purchasers under indorsement are considered in American and English Encyclopedia of Law, second edition, under head of "Assignment" and "Bills and Notes." The rule in case of assignment is that the assignee of a non-negotiable chose in action takes the same subject to all equities between the original parties up to the time of notice of assignment. (See 2 Am. & Eng. Ency. of Law, p. 1080, authorities under note 1; 4 Am. & Eng. Ency. of Law, p. 246, under head of "Bills and Notes.") "In a great proportion of cases agency arises, not from the use of express language nor from the existence of a well-defined relation, but from the general conduct of the parties. Where one holds out another as his agent with certain authority, he is liable for his acts on the ground of estoppel, whether he actually intends to be bound or not. So where one with full knowledge allows another to represent him as his agent and remains silent when occasion arises for him to speak, he may be held as principal." (See, also, *Meehem on Agency*, secs. 83, 84; *Sax v. Drake et al.*, 69 Iowa, 760, 28 N. W. 423; *Wilcox v. Carr et al.*, 37 Fed. 130; *Quinn v. Dresbach*,

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75 Cal. 159, 7 Am. St. Rep. 138, 16 Pac. 762.) "It is impossible to lay down any flexible rule by which it can be determined what evidence shall be sufficient to establish an agency in any given case, but it may be said in general terms that whatever evidence has a tendency to prove the agency is admissible, even though it be not full and satisfactory, as it is the province of the jury to pass on it." (Mechem on Agency, sec. 106; *New England Co. v. Gay*, 33 Fed. 636; *Roberts v. Peppell*, 55 Mich. 367, 21 N. W. 319; *Bronson v. Chappell*, 79 U. S. (12 Wall.) 681, 20 L. ed. 436; *Garner v. Fisher Co.*, 6 Utah, 332, 23 Pac. 755; *Doan v. Duncan*, 17 Ill. 272.) In conclusion we respectfully submit: 1. That the plaintiff asserted title only as assignee, using the identical language that was used in the case of *Warren v. Stoddart*, 6 Idaho, 692, 59 Pac. 540, which case was reversed by the court on the ground that plaintiff was not indorsee, and that for such reason it was not even necessary that we should prove the agency of the mortgagee but it was incumbent on the appellant to prove that respondent had actual notice that he was owner; 2. We submit that the evidence in this case is sufficient to estop the appellant from denying agency of the mortgagee in collection of his debt, and this wholly independent of any question as to the legal effect of recording or nonrecording the assignment; 3. If it be necessary to construe the law in relation to recording assignments of mortgages as the same affects payments made by the debtor to mortgagee, then the construction placed on section 2809, Revised Statutes of 1901, in case of *Van Keuren v. Corkins*, should be followed.

SULLIVAN, J.—The appellant, who was plaintiff, brought this action as assignee of a negotiable promissory note and mortgage securing the payment of the same, to foreclose said mortgage and to collect the amount due on said promissory note. The following facts appear from the record. That on the first day of March, 1897, James F. and Sarah M. Belk were the owners of lot 9 in block 48, Boise City, and on that date made application to the Bunnell & Eno Investment Company, a corporation, to negotiate for them a loan of \$850 on said lot. In that application the Belks constituted said corporation their agent for the purpose of negotiating said loan and agreed to pay them a commission of \$141.65 for such services; that on the first day of June, 1897, said Belks executed to said company the

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note and mortgage sued on herein, which became due March 1, 1902. The sum of money so borrowed was duly paid to the mortgagors. On June 21, 1897, said corporation transferred said note and mortgage to the appellant who paid said corporation the full amount of principal and interest on said note. The corporation, at the same time, executed and delivered to appellant a written guaranty guaranteeing the payment of the interest on said note as the same became due, and also guaranteed the payment of the principal when it became due, and also reserved to itself the right to repurchase said mortgage, and the appellant stipulated therein that for two years after the maturity of said note he would not foreclose the mortgage, or if he did so he would forfeit all claim on the mortgagee; that said note and mortgage with said guaranty and other papers relating to said loan were delivered to appellant and remained in his possession, or in the possession of his attorney, continually thereafter until after the commencement of this action, except the interest coupons, which were delivered to the said Bunnell & Eno Investment Company as the interest from time to time was paid; that in March, 1901, the Belks sold said premises to the respondent who assumed the payment of the mortgage as a part of the consideration for the premises; that about August 14, 1901, the respondent remitted directly to said corporation the full amount of principal and interest that would become due on March 1, 1902, the date when said note became due, and thereupon said corporation executed a release of said mortgage and delivered it to the respondent. Said corporation failed to pay said money over to the appellant, but embezzled the same, as such corporations have so frequently done, and failed, and went into a receiver's hands, and had its secretary appointed receiver.

It is contended by counsel for appellant that said insolvent corporation was the agent of the mortgagors and not the agent of the appellant in receiving the money in full payment of said debt. If that be true, said note has not been paid. It appears from the record that the attorney for the appellant was well acquainted with the president and vice-president of the Bunnell & Eno Investment Company, and had his office in the city of Philadelphia in the same building where said corporation had its office; that said attorney had sold more than fifteen million dollars' worth of obligations similar to the one involved in this

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case for said corporation, and had uniformly advised his clients against recording the assignments of such obligations or mortgages from said corporation, and had neglected to notify the mortgagors of such assignments and had constantly done all of the business of collecting the interest and principal upon such obligations through said insolvent corporation. And said attorney testified that he was of the opinion that the Bunnell & Eno Investment Company was the agent of the mortgagors, and that that opinion was based on the original application of the said Belks for a loan, that being the very first paper in the transaction. We will observe here that that application did constitute said corporation the agent of the Belks for the purpose of procuring said loan, and nothing more. It appears from the record that it procured said loan of and from itself and charged the Belks \$141.65 for inducing itself to make the loan to the Belks of \$850. Said attorney nor anyone else notified said Belks that said note and mortgage had been transferred until the fifteenth day of March, 1902, that being after said note and mortgage had become due and after said insolvent corporation had passed into the hands of its own treasurer as its receiver, and after said debt had been paid to said corporation and a release of said mortgage had been executed by said corporation and delivered to respondent. Said attorney testified at the trial that he thought it was eminently proper that the mortgagor should be informed that said corporation had become insolvent, and that he did notify them of that fact a long time after said mortgage and interest had been paid in full. If the attorney had only concluded that it was *eminently proper* that the mortgagor should have been informed that the Bunnell & Eno Investment Company had assigned said claim to his client, this information would no doubt have saved the bringing of this action and also have saved his client the loss of his money. Instead of receiving said interest payments through the First National Bank of Butte City, Montana, where they were made payable by said mortgage, he received them through the mortgagee, and instead of filing for record in the proper county his assignment of said mortgage and notifying the mortgagor of his purchase thereof, under the advice of his attorney, he failed to

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do so. By his acts he constituted the Bunnell & Eno Investment Company his agent, to receive the payments of interest and principal as they became due on said note.

Under all of the facts in this case we think it clear that the appellant is estopped from claiming that the Bunnell & Eno Investment Company was not his agent in the collection of the amount due on said note. He purchased said note and mortgage on the twenty-first day of June, 1897. He had a written contract with said corporation whereby it became responsible for the payment of the interest and principal of said note when due, and that said corporation might repurchase said note and mortgage at any time it saw fit to do so, and that the appellant should not foreclose said mortgage within two years after it became due. He failed to record his assignment in the proper county; he failed to notify the mortgagors of such assignment; he accepted through said corporation nine interest payments covering a period of four years, and delivered the nine interest coupons therefor to the mortgagor, and these facts, in connection with others disclosed by the record, estopped the appellant from claiming that said corporation was not his agent. We have not overlooked the doctrine laid down in *Hollingshead v. Globe Ins. Co.*, 8 N. Dak. 35, 77 N. W. 89, 42 L. R. A. 659, *Bronson v. Ashlock*, 2 Kan. App. 255, 41 Pac. 1068, *Schultz v. Stroelowitz*, 191 Ill. 249, 61 N. E. 92, *Biggerstaff v. Marston*, 161 Mass. 101, 31 N. E. 785, and *Dodge v. Birkenfeld*, 20 Mont. 115, 49 Pac. 590, and other authorities cited. The doctrine of those cases is not applicable to the facts in this case. We are fully satisfied that the appellant is not entitled to recover against the defendant but must look to his agent, the defunct Bunnell & Eno Investment Company. The judgment is affirmed with costs in favor of the respondent.

Stockslager, C. J., and Ailshie, J., concur.

Opinion of the Court—Ailshie, J., on Rehearing.

ON REHEARING.

(June 5, 1905.)

PENNYPACKER v. LATIMER.

[81 Pac. 56.]

2. Under the facts of this case it is held that the plaintiff, appellant here, is estopped to deny the authority of the mortgagee, the Bunnell & Eno Investment Company, to collect the debt and release and discharge the security.

3. Where one of two parties must lose, that loss should fall upon the one whose action or conduct has induced or made possible such loss.

4. Necessity for recording assignment of mortgage in order to hold the purchaser of the mortgaged realty liable to the assignee after such purchaser has procured a release and satisfaction from the mortgagee, *quære*.

(Syllabus by the court.)

AILSHIE, J.—A rehearing was granted in this case and counsel for the respective parties have filed additional briefs and reargued the case. The appellant has devoted most of his brief to a discussion of the proposition that it was unnecessary for the assignee of the note and mortgage to record his assignment, and that the recording laws of this state have no application to such an instrument, and that the assignee was not chargeable with negligence for a failure to record it. The view we take of this case makes it unnecessary for us to pass upon that question here. It would seem, however, that, under our recording laws, a purchaser of mortgaged realty who has neither actual nor constructive notice of the assignment of the mortgage and debt secured thereby would be justified in applying directly to the mortgagee, who appears by the official records to be the holder of the encumbrance upon his realty, and that he would be protected by law in procuring from the mortgagee such release of the encumbrance as would clear the record title. But we rest our decision upon an entirely different question, and therefore decline to pass upon this point. After a further examination of the case, we are of opinion that whether or not the defendant succeeded in establishing the agency of the Bun-

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nell & Eno Investment Company to collect the principal and interest in this case for the assignee, sufficient facts and circumstances have been developed, as disclosed by the record, to justify a court of equity in applying the doctrine of estoppel to the assignee, Pennypacker. It is quite clear from the facts of the case that either the appellant or respondent must suffer the loss of the amount represented by this note and mortgage. Such being the case, by all the known rules of equity and good conscience, that loss should fall upon the one whose action and conduct, or inaction when action was necessary, has induced or made possible such loss. It seems to us that the conduct of the appellant has contributed the greater cause toward the loss in this case. The contract and agreement accompanying the assignment of the note and mortgage is as follows:

“For value received the Bunnell & Eno Investment Company hereby agrees as to the annexed note made by James F. Belk and Sarah M. Belk to said company or order for eight hundred and fifty 00-100 dollars, dated March 1, 1902, and secured by mortgage of even date therewith:

“First. That it will pay semi-annual interest thereon at the rate of six per cent per annum one day after the same becomes due in case of default in payment thereof by the maker.

“Second. That in the event of the nonpayment of the principal of said note when the same becomes due and payable it will pay to the owner and holder thereof within two years after its maturity eight hundred and fifty 00-100 dollars principal, or such part of said sum as may remain unpaid on said note.

“Third. That it will make such payments of interest and principal at the office of William McGeorge, Jr., Bullit Building, Philadelphia, Pennsylvania. Provided, that at any time the said The Bunnell & Eno Investment Company shall render to the legal holder of said note the sum of eight hundred and fifty 00-100 dollars principal or such part of said sum as may be unpaid thereon with accrued interest, the said holder shall thereupon indorse without recourse and deliver said note together with the mortgage securing the same, properly assigned to the said Bunnell & Eno Investment Company, or if he shall elect to do so, then this agreement shall become and henceforth be null and

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void. And provided also that any suit commenced by the holder to collect said note or to foreclose the mortgage securing the same before the expiration of two years from its maturity without the consent in writing of the Bunnell & Eno Investment Company, shall render this agreement void."

—and appears to be in the identical language of the agreement considered by the supreme court of Texas in *Cunningham v. McDonald*, 83 S. W. 372, upon which appellant placed great reliance on the rehearing of this case. Notwithstanding our great respect for and confidence in that distinguished court, we are unable to agree with it as to the meaning and import of this instrument. We think, rather, that the court of civil appeals of that state took the correct view of this agreement. (See *Cunningham v. McDonald* (Tex. Civ. App.), 80 S. W. 871, and 81 S. W. 52.) In the first place the appellant required the Bunnell & Eno Investment Company to guarantee the payment of the principal and interest as the same should fall due, and while doing this the investment company, on the other hand, required the stipulation that it should have the right to repurchase the notes and mortgage at any time within two years after maturity, and obligated the appellant not to institute foreclosure proceedings within that period of time under penalty of forfeiture of the guaranty. This certainly amounted to such an interest retained in the paper thus transferred as to require a consideration passing from the appellant to the guarantor to satisfy and discharge it. In other words, this interest could only be paid for and satisfied by a surrender of the guaranty and obligation of the company to pay in case of default. In the second place, under the contract of the mortgagor the principal and coupon interest notes were made payable at the First National Bank of Butte, Montana; but Pennypacker, under this agreement of guaranty and assignment, obligated the Bunnell & Eno Investment Company to pay all these notes within one day after maturity at the office of William McGeorge, Jr., in the Bullit Building, Philadelphia, Pennsylvania. It is evident from this provision that the assignee, Pennypacker, did not contemplate dealing in any respect with the mortgagor, but looked entirely to the mortgagee, the Bunnell & Eno Investment Com-

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pany. It is clear that this paper could not be at the First National Bank in Butte at maturity and also at McGeorge's office at Philadelphia one day after maturity, and it is equally as clear to our minds that the appellant did not mean to hold the paper in Philadelphia until one day after maturity, and thereafter suffer a loss of interest for a period of seven or eight days that would be required for its transmission from Philadelphia to Butte and the return of the money therefor in case the guarantor failed to pay. It is a matter of such general practice, that we do not need to look to a court record to find evidence of it, that the owners and holders of such paper uniformly send out notice in advance of maturity to the person or corporation responsible therefor and from whom they expect to collect the same. In this case the appellant never at any time dealt with the respondent, nor did he ever attempt to collect either principal or interest from the respondent until after the failure of the Bunnell & Eno Investment Company, at which time his counsel considered it "eminently proper that the mortgagor should be informed" as to the insolvency of the mortgagee. The appellant has knowingly permitted the mortgagee to continue its relation and conduct toward the mortgagors and their successor, the respondent, the same since the assignment of the paper as before dealing with it as the lawful holder thereof, and has by his contract and conduct with the mortgagee encouraged and, in substance, enjoined on it the necessity of a continuation of that relation until now, in justice and fairness to the respondent, he should not be permitted to deny the authority of the mortgagee to collect the money and release and discharge the security. He would not disclose himself to or deal with the maker of the paper so long as the guarantor was solvent, and now he should not be permitted to disclose and assert himself as an indorsee before maturity, when to do so will be to force the owner of the security to pay the claim a second time.

There is sufficient evidence in the record to sustain the judgment in this case, and it will therefore be affirmed, with costs to respondent.

Stockslager, C. J., and Sullivan, J., concur.

Opinion of the Court—Sullivan, J.

(February 16, 1905.)

STANDLEY v. FLINT.

[79 Pac. 815.]

ISSUES—FINDINGS OF FACT.

1. Where the court omits to find on all of the material issues, the judgment must be reversed.

(Syllabus by the court.)

APPEAL from the District Court of Bannock County. Honorable Alfred Budge, Judge.

Action to set aside certain conveyances. Judgment for plaintiff. Reversed.

Thomas Maloney, for Appellant.

It will be seen on inspection of the pleadings in this record that the trial court wholly failed to make findings of fact on all the issues raised in the pleadings. The universal rule is that there must be a finding on every material issue raised in the pleadings. Each fact averred should be directly and distinctly found. (*Pratalongo v. Larco*, 47 Cal. 378; *Coglan v. Beard*, 65 Cal. 58-62, 2 Pac. 737; *Coveny v. Hale*, 49 Cal. 552; *Walker v. Brem*, 67 Cal. 600, 8 Pac. 320.) A judgment will be reversed for defective or improper findings. (*Gould v. Stafford*, 77 Cal. 66, 18 Pac. 879.) Failure to find on affirmative defenses on which evidence has been submitted is cause for reversal. (*Christy v. Water Works*, 84 Cal. 541, 24 Pac. 307.) If the court omits to find on a material issue, the judgment cannot be supported. (*Traverso v. Tate*, 82 Cal. 170, 22 Pac. 1082; *Smith v. Mohn*, 87 Cal. 489, 25 Pac. 696; *Wilson v. Wilson*, 6 Idaho, 597, 57 Pac. 708; *Broadbent v. Brumback*, 2 Idaho, 366, 16 Pac. 555; *Bowman v. Ayers*, 2 Idaho (282), 305, 13 Pac. 346.)

S. C. Winters, for Respondent, cites no authorities on the point decided.

SULLIVAN, J.—This action was brought for the purpose of setting aside a certain deed and bills of sale executed by the

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respondent to the appellant, Mrs. Ruth Flint. It is alleged by the respondent that said conveyances and bills of sale were given by him to said appellant, with the agreement and understanding that said appellant was to pay certain debts of respondent, which debts were set forth in an exhibit attached to the complaint; that appellant had failed and refused to pay said debts or any part thereof, and a cancellation of said conveyances was prayed for, and also the appointment of a receiver and for an accounting from said appellant for all property so intrusted to her and the profits arising therefrom. The action was tried by the court without a jury and certain findings of fact, conclusions of law and what is denominated in the record a judgment, was entered in favor of the respondent. Among others, the following facts appear from the record: That on or about the twenty-first day of November, 1901, the respondent was the owner in the possession of several town lots situated in the city of Pocatello, with improvements thereon, and was also the owner and in the possession of a stock of plumbing goods, and was conducting a plumbing business, and also was the owner of and conducting a laundry business. The said respondent was the son in law of said appellant, and, being in debt about \$1,200 to divers parties, which debts were unsecured, it is alleged that he turned said town lots and plumbing goods and business and laundry and said laundry business, by conveyance and bills of sale, over to the appellant for the purpose aforesaid. The appellant by her answer denied the allegation of the complaint that said real estate, plumbing and laundry business was turned over to her as alleged in the complaint, and averred that she had bought the same outright. The first finding of fact made by the court is to the effect that respondent was the owner and in the possession of the town lots above referred to. And the second finding is to the effect that he was the owner and in possession of the stock of plumbing goods mentioned in the complaint; and the third finding is as follows:

"That on or about said date the plaintiff and his wife, Josephine Standley, made, executed and delivered to the defendant, Ruth Flint, the deed attached to the complaint and bill of sale for said stock of plumbing goods as attached to the

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complaint. That there was no consideration passed between plaintiff and defendant. (and that said transfer was made for the sole purpose of hindering, delaying and defrauding the creditors of the plaintiff, James A. Standley, and that the defendant, Flint, was a party thereto), and that at that time the plaintiff was indebted to numerous creditors in about \$1,200 over and above the mortgages of record on the said real estate, and that the said indebtedness still exists."

The fourth finding is that the whole of said property is now in the hands of a receiver appointed by the court. The fifth finding is that the defendants were husband and wife and the parents of the wife of the plaintiff, and that said property was transferred to them on account of such fiduciary relation, and the conclusion of law drawn from said facts is that the whole of said property should be sold by said receiver at public auction, and the proceeds of the sale, applied, under the order of the court, to the payment of the debts and liabilities of the respondent in order of priority of liens, and the unsecured debts to be paid pro rata, and that after all said liabilities are paid, the balance remaining, if any, shall be held by the receiver until the further order of the court. Excluding the formal part of the judgment, it is as follows:

"It is ordered, adjudged and decreed, that the receiver heretofore appointed by this court in said action, after due and legal notice as required by law and the rules of this court, sell all the property mentioned in the complaint of the plaintiff, or so much thereof as is now in his possession, at public auction in the manner as property is sold under execution, and make his return thereof to this court for approval; and that after approval of the said sale by this court or the judge thereof, the said receiver pay out of the proceeds of such sale the valid mortgage liens now on said real estate and that out of the residue of said proceeds pay pro rata the other debts and liabilities of the plaintiff existing at the time the said transfers were made, to wit, November 1, 1901; but that the said receiver first pay the expenses of such sale, the expenses of the receiver and his commissions.

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"That before any of the expenses or commissions as aforesaid, or any of the indebtedness as aforesaid shall be paid by the said receiver, whether liens or otherwise, the same must be first approved by this court or the judge thereof upon the application of the receiver.

"That the said receiver make out and file with this court a list of all of the indebtedness of the said plaintiff on the first day of November, 1901, and state which are liens with due and legal proof thereof and that which is unsecured, and the date of the creation of said indebtedness that the same may be allowed or disapproved by this court or the judge thereof.

"That after the payment of all of the said indebtedness and expenses above mentioned, the remainder of the proceeds of such sale, if any, shall remain in the hands of the receiver until the further order of this court.

"It is further ordered that costs of this action be paid out of the proceeds of the sale of the property in the hands of the receiver.

"Done this seventh day of July, 1903."

The brief of appellants fails to comply with paragraph 1 of rule 6 of this court, in that it does not contain a distinct enumeration of the several errors relied on. The requirements of that rule should be carefully followed by counsel for appellants in preparing briefs. In the brief before us, however, counsel has discussed several points, and one is that the general demurrer to the complaint should have been sustained for the reason that there was no equity in the complaint. There is nothing in that contention. The complaint states a cause of action. The next contention is that the findings are not responsive to the issues. The material issue as presented by the pleadings is whether the transfer of said real estate and personal property was made for the purpose alleged in the complaint, to wit, securing the appellants in the payment of the debts due and owing by the respondent to divers creditors which it is alleged the appellants agreed to pay. The appellants deny those allegations of the complaint and aver that they had made an actual and *bona fide* purchase of all of said property and paid

Points decided.

the full consideration agreed to be paid therefor. Upon those issues the court made no findings. It did find, however, that said property was transferred without consideration, and for the sole purpose of hindering, delaying and defrauding the creditors of the respondent, and that the appellants were parties thereto.

Counsel for appellants and respondent both take issue with that finding and contend that there was no fraud alleged and no fraud proven on the trial of the case. While we think there were earmarks of fraud cropping out here and there in the testimony, we do not think the finding of fraud by the court was justified from any issue made by the pleadings or proof offered on the trial. The judgment entered and above quoted is not such a one in substance or form as this court can approve, and that in connection with the failure to find on some of the material issues demands the reversal of the judgment and the remanding of the case to the trial court for further proceedings in accordance with this decision. The trial court may in its discretion permit either party to introduce any pertinent evidence not introduced on the former trial, or in case neither party offers any new evidence the court may make findings of fact and conclusions of law and enter judgment on the evidence introduced on the former trial.

The judgment is reversed and the cause remanded. Costs are awarded to appellants.

Stockslager, C. J., and Ailshie, J., concur.

(February 23, 1905.)

WHITNEY v. DEWEY.

[80 Pac. 1117.]

ASSIGNMENT OF ERRORS ON APPEAL—ORDER ON MOTION FOR NEW TRIAL—EXCEPTION ALLOWED BY LAW—DELIVERY OF DEED—WHEN COMPLETE—PAROL EVIDENCE ADMISSIBLE TO SHOW DELIVERY—PAROL EVIDENCE NOT ADMISSIBLE TO ATTACH CONDITIONS TO DEED ABSOLUTE ON ITS FACE—DEEDS IN ESCROW—ESCROW CANNOT BE HELD BY GRANTEE—WRONGFUL TAKING OF DEED BY GRANTEE MAY BE RATIFIED BY GRANTOR.

Points decided.

1. Where a motion for a new trial has been made and the statement used on such motion contained an assignment and specification of errors, and an appeal is taken from the order denying the motion and the original brief of appellant contains no enumeration of errors relied on, but refers to the transcript and discusses such errors, and prior to the argument in the appellate court a supplemental brief is filed by appellant making a specific enumeration of such errors, the same will be regarded as a substantial compliance with the rules of this court and the case will be examined on the merits.

2. Section 4427, Revised Statutes, gives to an aggrieved party an exception to the ruling of the court in granting or overruling a motion for a new trial, and on appeal from such order the appellant is entitled to have the assignment and specification of errors contained in his statement used on the hearing of such motion examined and considered by the appellate court.

3. A deed absolute on its face cannot be delivered to the grantee therein named to be by him held in escrow, and a delivery which purports to be such will operate as absolute and freed from all parol conditions, and title will vest at once.

4. It is a settled principle of law that the evidence of delivery of a deed must come from without the deed; in other words, a deed does not upon its face show delivery, and therefore parol evidence is admissible to show such fact.

5. Parol evidence is inadmissible to show that a deed delivered to the grantee and absolute on its face shall take effect only upon the performance of some condition or the happening of some contingency unexpressed therein.

6. *Id.*—In such case the vesting of title is determined by the legal effect of the terms of the grant and cannot be controlled by parol evidence.

7. A grantor cannot by warranty deed, absolute on its face, and free from conditions or restrictions, convey such a title to his grantee as will enable the grantee to pass a good title to a specific corporation and at the same time attach such parol conditions to the deed upon its delivery as to preclude the grantee from transferring an equally good title to any other person or corporation.

8. Where B. executes a warranty deed free from any conditions or qualifications as to the vesting of title and delivers it to the grantee, W., accompanied with a contemporaneous parol agreement to the effect that W. shall form a corporation and deed the property to such corporation and thereupon pay B. \$1,000 cash and deliver to B. \$5,000 worth of first mortgage bonds of the corporation secured on the property so deeded, and the deed was placed in the hands of the grantee to facilitate such transaction;

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held, that the delivery was absolute and title vested at once in the grantee.

9. Even though a valid delivery of a deed had not been made at the time of its execution, still the grantor may thereafter ratify the wrongful taking of the deed by the grantee after the grantor has acquired complete knowledge of the facts of the transaction, and thereby perfect the title.

(Syllabus by the court.)

APPEAL from District Court in and for Canyon County.
Honorable George H. Stewart, Judge.

Plaintiff commenced his action to quiet his title to a certain tract of land situate in the counties of Canyon and Boise, and for a perpetual injunction restraining defendant further asserting any claim in and to the property. From a judgment in favor of the plaintiff and an order denying his motion for a new trial, defendant appeals. Reversed.

W. E. Borah and N. M. Ruick, for Appellant.

Admissibility of evidence under the pleadings: We ask the court to consider, in the first place, the allegations of the complaint and certain objections made to the introduction of evidence under the pleadings. These objections go to the controlling proposition in the case—delivery of the warranty deed. They had alleged upon a written contract, alleged its violation, and they were bound by their allegations. We know of no rule of pleading and practice which will permit an allegation that a deed was delivered under the terms of a written contract and proof of the fact that it was delivered under an oral contract, when the question of delivery is not an incident but goes to the vital controversy in the case and to the very validity of the deed itself. There is an entire variance between the case alleged and the evidence offered in support of it, all of which was objected to, etc. The objection should have been sustained. (*Spader v. McNell*, 130 Cal. 500, 62 Pac. 828.) The evidence must be confined to the issues made by the pleadings. (*Frazier v. Ebenezer Baptist Church*, 60 Kan. 404, 56 Pac. 752; *Westchester etc. Ins. Co. v. Coverdale*, 9 Kan. App. 651, 58 Pac. 1029.) The rule is that the allegations and proofs must

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correspond, and the consequence of the rule is another, which is that evidence of the matter or evidence essential to the support of the action cannot be heard unless the complaint contains an averment of said essential matter or evidence. (*Maynard v. Firemen's Fund Ins. Co.*, 34 Cal. 48, 91 Am. Dec. 672; *Stout v. Coffin*, 28 Cal. 65; *Cox v. McLaughlin*, 63 Cal. 207.) In the case below the plaintiff alleged upon a written contract but sought to prove by parol work outside the contract, and it was held to be a variance and the evidence inadmissible. (*Hinkle v. San Francisco Ry. Co.*, 55 Cal. 627.) All prior oral negotiations must be regarded as merged in the written contract. When an action or defense is based upon a contract not in writing and the contract appears upon the trial to be a written one, the action or defense must fail. The converse of this rule would of course be true that if the action is based upon a written contract, proof as to an oral contract is inadmissible. (*Perkins Co. v. Yeoman*, 23 Ind. App. 483, 55 N. E. 782; *Stewart v. Cleveland etc. Ry. Co.*, 21 Ind. App. 218, 52 N. E. 89; *Trueblood v. Shellhouse*, 19 Ind. App. 91, 49 N. E. 47.) In a complaint based on a written instrument, a parol agreement is inadmissible. (*Browning v. Walbrun*, 45 Mo. 477; *Glick v. Weatherwax*, 14 Wash. 560, 45 Pac. 156.) Oral testimony to vary or add to written contract: There is, however, a more forcible and controlling reason why parol evidence was not admissible and could not in this case become admissible under any conditions of the pleadings. This transaction had been reduced to writing. The contract of December 26th had been completed and conclusively bound the parties. All prior negotiations were merged in this written contract, and the parties having seen proper to enter into writing that conclusively bound them, they could neither add to, change or modify the writing thus made. The only criterion of the completeness of the written contract as to a full expression of the agreement of the parties is the writing itself. If it imports on its face to be a complete expression of the whole agreement—that is, contains such language as imports a complete legal obligation—it is to be presumed that the parties here introduced into it every material item and term; and parol evidence cannot be

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admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed. The rule forbids to add by parol when the writing is silent as well as to vary where it speaks, and the law controlling the operation of a written contract becomes a part of it and cannot be varied by parol any more than what is written. (*Thompson v. Libby*, 34 Minn. 374, 26 N. W. 1; *Naumberg v. Young*, 44 N. J. L. 333, 43 Am. Rep. 380; *Hei v. Heller*, 53 Wis. 415, 10 N. W. 620; *Creery v. Hallery*, 14 Wend. 26; *Stone v. Harmon*, 31 Minn. 512, 19 N. W. 88.) Where parties to an agreement have reduced it to writing, the writing is presumed to embrace the whole thereof. (*Mackey v. Magnon*, 12 Colo. App. 137, 54 Pac. 907; *Ming v. Pratt*, 22 Mont. 262, 56 Pac. 279; *Judson v. Malloy*, 40 Cal. 307.) Parol evidence as to the history of a written agreement is not admissible, but the written agreement itself must be taken as the only expression of the contract between the parties. (*McIntosh Co. v. Rice*, 13 Colo. App. 393, 58 Pac. 358; *Irving v. Cunningham*, 66 Cal. 15, 4 Pac. 766; *Liverpool Co. v. T. M. Richardson Lumber Co.*, 11 Okla. 585, 69 Pac. 938; *Fosyth Mfg. Co. v. Castlen*, 112 Ga. 199, 37 S. E. 485; *Hand v. Miller*, 58 App. Div. 126, 68 N. Y. Supp. 531.) Parol evidence to control legal effect of deed or postpone its operation: The plaintiff seeks to avoid the effect of this warranty deed of January 25th by showing an escrow, and this he seeks to show by parol evidence. We frankly admit that there must be assignments of error, and that without such assignments this court is not bound to consider the appeal. We therefore ask the court to recur to the transcript in this case. The specifications are set forth in detail, and we believe will be found to be unnecessarily full and complete. But in discussing the matter, the counsel for respondent ignore these assignments. They do not claim that they are insufficient, but seem to contend that, because they are not repeated in so many words in the brief, they are not sufficient. Yet the multitude of authorities cited by counsel have absolutely no relevancy except where the transcript contains no assignment of error. In the case of

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United States v. Tidball (Ariz.), 29 Pac. 385, cited, there were no assignments at all in the transcript and the court said: "The transcript contains no assignment of error." But ours does. None of the other cases cited by counsel are under practice similar to ours except where they refer not to the brief, but to the lack of assignments in the transcript or statement. Our statute expressly provides that an order granting or overruling a motion for new trial, a contested motion, is deemed excepted to, and "need not, unless desired by the party objecting thereto, be embodied in a bill of exceptions, but the same appearing in the record or files may be reviewed upon appeal as though settled in such bill of exceptions." (Rev. Stats. 4427.) The appeal in this case is taken from the order overruling the motion for new trial and from the judgment and is brought upon a statement of the case. In this case there was no assignment of error in the overruling of the motion for new trial, and the question was raised as to the power of the court to review the record, but the court held that it could do so and that the statement was the same as a bill of exceptions, and that it would review the matters on admission of evidence, etc. (*Bradbury v. Idaho & O. L. Co.*, 2 Idaho, 239, 10 Pac. 620; *Thiessen v. Riggs*, 5 Idaho, 487, 51 Pac. 107; *Palmer v. Pettingill*, 6 Idaho, 346, 55 Pac. 653; *McEntee v. Cook*, 76 Cal. 187, 18 Pac. 259.) A statement used on motion for new trial may be used on appeal from the judgment for the purpose of determining whether the trial court made any errors of law during the trial. (*Young v. Tiner*, 4 Idaho, 269, 38 Pac. 698.) Where the record is in proper shape and the objection is as to the failure of the brief to comply with the rules of the court, the proper practice is to move to strike the brief from the files and then the court may permit an amendment or reconstruction of the brief upon terms. Here the parties have not only taken time in which to answer the brief, but have fully answered upon the merits and are therefore not in a position to complain. (*Johns v. Ruff*, 12 N. Dak. 74, 95 N. W. 440; *O'Brien v. Miller*, 4 N. Dak. 308, 50 Am. St. Rep. 669, 60 N. W. 841; *Vidger v. Nolin*, 10 N. Dak. 353, 87 N. W. 593; *Campodonico v. Oregon Imp. Co.*, 85 Cal. 218, 24 Pac. 176.)

Argument for Respondent.

O. O. Haga and Hawley, Puckett & Hawley, for Respondent.

Appellant has assigned no error in this court on which he relies or seeks a reversal of the judgment entered against him, contrary to the established rules of practice and the rules of this court. Paragraph 1 of rule 6 of this court provides, among other things, that "the brief of appellant and plaintiff in error shall also contain a distinct enumeration of the several errors relied on." This court is by statute authorized and empowered to make rules not inconsistent with the laws of the state for its own government and the transaction of its business. (Rev. Stats., sec. 3863.) But independent of statute every court of record has the inherent power to make rules for the transaction and regulation of its business. (8 Am. & Eng. Ency. of Law, 29.) The court equally with suitors is bound by its rules. They must be construed as statutes are construed. (*Hanson v. McCue*, 43 Cal. 178.) An assignment of error in this court performs the same office as a declaration in a court of original jurisdiction. It would be just as regular and proper for the circuit court to render a judgment in a cause where there was no declaration, as for this court to affirm or reverse a judgment where there is no assignment of errors. (*Williston v. Fisher*, 28 Ill. 43.) The failure to file assignment of errors must entail an affirmance of the judgment or decree. (*McNeill v. Kyle*, 86 Ala. 338, 5 South. 461; *Sutherland v. Putman* (Ariz.), 24 Pac. 320; *Globe etc. Co. v. Boyum*, 3 N. Dak. 538, 58 N. W. 339; 2 Ency. of Pl. & Pr., pp. 922-927.) Where appellant's brief does not contain a specification of the errors relied on, numbered and set out separately and particularly, as provided by supreme court rule 10, section 3, subdivision b, the judgment will be affirmed. (*Rehberg v. Greiser*, 24 Mont. 487, 62 Pac. 820, and on rehearing, 63 Pac. 41; *Schatzlein Paint Co. v. Godin*, 24 Mont. 483, 62 Pac. 819; *Shilling v. Curran* (Mont.), 76 Pac. 998, 1003.) All exceptions taken in the lower court will be treated as waived unless they are assigned as errors in this court. (*Purdy v. Steele*, 1 Idaho, 216; *Brovelli v. Bianchi*, 136 Cal. 612, 69 Pac. 416; *Squires v. Foorman*, 10 Cal. 298; *Haggin v. Clark*, 28 Cal. 162; *Haas v. Pueblo Co.*, 5 Colo. 125.) The fact that the transcript contains certain specifica-

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tions of error urged on motion for a new trial is not sufficient on appeal. The rules of this court require that the errors must be set out in the brief of counsel. Errors urged on motion for a new trial may be waived on appeal, and other errors urged in their stead. (*Pearson v. Flannagan*, 52 Tex. 266; *Chappell v. Missouri Pac. R. R. Co.*, 75 Tex. 82, 12 S. W. 977; *San Antonio etc. R. Co. v. Adams*, 6 Tex. Civ. App. 102, 24 S. W. 839; *Hutton v. Reed*, 25 Cal. 479; *Brewster v. Johnson*, 51 Cal. 222; *McCormick v. Phillips*, 4 Dak. 506, 34 N. W. 39; *Syndicate Imp. Co. v. Bradley*, 6 Wyo. 171, 43 Pac. 79, 44 Pac. 60; *Ashley v. Martin*, 50 Ala. 537; *Ashman v. Flint*, 90 Mich. 567, 51 N. W. 645; *Bishop v. Middleton*, 43 Neb. 10, 61 N. W. 129, 26 L. R. A. 445; *Daggs v. Hoskins* (Ariz.), 52 Pac. 350; *Penny v. Fellner* (Okla.), 50 Pac. 123; *Gavin v. Gavin*, 92 Cal. 292, 28 Pac. 567; *Kyle v. Craig*, 125 Cal. 107, 57 Pac. 791; *Jay v. Zeissness*, 6 Okla. 591, 52 Pac. 928.) Alleged errors in findings of fact must be specifically pointed out to secure a review thereof. (*Metropolitan Nat. Bank v. Rogers*, 53 Fed. 776; *Richardson v. Walton*, 61 Fed. 535; *Nading v. Elliott*, 137 Ind. 261, 36 N. E. 695; *Appeal of Dabney*, 120 Pa. St. 344, 14 Atl. 158; *Luttlopp v. Heckmann*, 70 N. J. L. 272, 57 Atl. 1046.) An assignment that the court erred in its conclusions of law is not available, unless all the conclusions of law be wrong. (*Vinall v. Hendricks* (Ind. App.), 71 N. E. 682; *City of Lincoln v. Bailey* (Neb.), 99 N. W. 830; *Bitter v. Mouat Lumber Co.*, 27 Colo. 120, 59 Pac. 403.) The record shows that appellant in due season made motion for a new trial, which was overruled by the court. The order of the court overruling appellant's motion for a new trial is not assigned as error on appeal, nor referred to in any manner in appellant's brief. It is well settled that this court will not review the ruling of the lower court in passing on this motion, unless such ruling is assigned as error on appeal. (*Chicago etc. R. Co. v. German Ins. Co.*, 2 Kan. App. 385, 42 Pac. 594; *Case v. Jacobitz*, 9 Kan. App. 842, 62 Pac. 115; *Whittinger v. Nelson*, 29 Ind. 441; *Bartholomew v. Preston*, 46 Ind. 286; *Pierce v. Manning*, 2 S. Dak. 517, 51 N. W. 332.) We contend that a re-examination of the issues of fact cannot be had in this court, except on appeal

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from an order overruling a motion for a new trial and the assignment of such ruling as error in this court, and that appellant has not done. The statement used on motion for a new trial, when used on an appeal from a judgment, takes the place of a bill of exceptions only, and only errors of law therein contained, if properly specified, can be considered. (Rev. Stats., sec. 4426; *Carpenter v. Williamson*, 25 Cal. 154; *United States v. Trabing*, 3 Wyo. 147, 6 Pac. 721; *Withers v. Kemper*, 25 Mont. 432, 65 Pac. 422.) Findings of fact by a court sitting without a jury is equivalent to a verdict, and hence will be disturbed only when it is clearly erroneous or shown that the judge was influenced by improper motives. (*Spaulding v. Coeur d'Alene Ry. Co.*, 5 Idaho, 528, 51 Pac. 408; *Claybaugh v. Henessy*, 21 Ill. App. 124; *United States v. Adams*, 73 U. S. 101, 18 L. ed. 792; *Murdock v. Clarke*, 90 Cal. 427, 27 Pac. 275; *Murphy v. Cunningham*, 1 Colo. 467; *Lynch v. Grayson*, 5 N. Mex. 487, 25 Pac. 992; *San Fernando etc. Co. v. Humphrey*, 130 Fed. 298.) The declarations of White against his title under such a deed are admissible, not only as against himself but as against parties claiming under him, is a familiar principle. Subsequent claimants are considered as standing in his place, and as having taken the title *cum onere*, subject to the same charges and restrictions which attached to it in his hands. (*Stanley v. Green*, 12 Cal. 148; *Daly v. Josslyn*, 7 Idaho, 657, 65 Pac. 442.) This deed was not delivered to White, in the sense that such term is used in the conveyance of real property. There was no intention on the part of either White or Beery that the title should pass. Delivery, as used with reference to a conveyance of land, does not mean a manual delivery alone. The important element always requisite to pass title to the grantee is the intent. (9 Am. & Eng. Ency. of Law, 154; *Black v. Sharkey*, 104 Cal. 279, 37 Pac. 939; *Branson v. Oregonian Ry. Co.*, 11 Or. 161, 2 Pac. 86; *Lee v. Richmond*, 90 Iowa, 695, 57 N. W. 613; *Steel v. Miller*, 40 Iowa, 403, 406; *Berkshire v. Peterson*, 83 Iowa, 197, 48 N. W. 1035; *Head Bros. v. Thompson*, 77 Iowa, 267, 42 N. W. 188; *Bunn v. Stewart*, 183 Mo. 375, 81 S. W. 1091; *Hastings v. Vaughn*, 5 Cal. 315.) Delivery is a question of fact to be determined by the jury, and depends

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more upon the intention of the parties than upon the mode of fulfilling the intention. To the same effect, *Gilmore v. Morris*, 13 Mo. App. 114; *Shaw v. Cunningham*, 16 S. C. 631; *Lindsay v. Lindsay*, 11 Vt. 621; *Hurlburt v. Wheeler*, 40 N. H. 73; *Farlee v. Farlee*, 21 N. J. L. 279; *Stoney v. Wenterhalter* (Pa.), 11 Atl. 611; *Stephens v. Buffalo etc. R. R. Co.*, 20 Barb. 332. To render a deed operative to pass title, there must be not only a delivery of the deed by the grantor, but also an acceptance thereof by the grantee. Acceptance of the conveyance by the grantee is as essential as the delivery by the grantor, and where acceptance is not proven, and the facts do not justify the presumption of law that the grantee has accepted, the title does not pass. (*Moore v. Flynn*, 135 Ill. 74, 79, 25 N. E. 844; *Metcalf v. Brandon*, 60 Miss. 685; *Koehler v. Hughes*, 148 N. Y. 507, 42 N. E. 1051; *Bummerman v. Jennings*, 101 Ind. 253; *Commonwealth, Thompson's Heirs etc. v. Jackson, etc.*, 10 Bush (Ky.), 424; *Meigs v. Dexter*, 172 Mass. 217, 52 N. E. 75; *Hawkes v. Pike*, 105 Mass. 561, 7 Am. Rep. 554; *Comer v. Baldwin*, 16 Minn. 172; *Stephens v. Buffalo etc. Ry. Co.*, 20 Barb. 332; *Steffian v. Milmo Bank*, 69 Tex. 513, 6 S. W. 823; *Wheeler & Wilson Mfg. Co. v. Briggs* (Tex.), 18 S. W. 555; *Wiggins v. Lusk*, 12 Ill. 132; *Woodbury v. Fisher*, 20 Ind. 387, 83 Am. Dec. 325; *Herbert v. Herbert*, 1 Ill. (Breese) 354; *McGehee v. White*, 31 Miss. 41; *Deere, Wells & Co. v. Nelson*, 73 Iowa, 187, 34 N. W. 809; *Higman v. Stewart*, 38 Mich. 513, 524; *Jummel v. Mann*, 80 Ill. App. 288; *Stevens v. Stevens*, 150 Mass. 557, 23 N. E. 378.) That evidence of delivery and acceptance are admissible under the pleadings of this case was directly passed upon in the cases of *Leppock v. National Bank of Md.*, 32 Md. 136; *Kearney v. Jeffries*, 48 Miss. 343, 359; *McGehee v. White*, 31 Miss. 41; *Bullitt, Miller & Co. v. Taylor*, 34 Miss. 708, 69 Am. Dec. 412; *Commonwealth v. Jackson*, 73 Ky. (10 Bush) 424; 2 Washburn on Real Property, 581; *Tuttle v. Turner*, 28 Tex. 759.

AILSHIE, J.—A motion was made in this case to strike from the files the “supplemental brief of appellant,” upon the grounds that the same was filed without permission of court having been obtained, and for the further reason that there is no authority in law or any rule of this court for the filing of

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a supplemental brief. It appears that within the time prescribed by the rules of this court the appellant served his brief upon the respondent, but the original brief filed by appellant contains no enumeration of errors relied on for a reversal of the judgment. The original brief, however, discusses errors complained of and refers to the page and folio of the transcript containing the same. Appellant made a motion for a new trial in the lower court, and his statement on motion for new trial contains specific assignments of error covering nine pages of the transcript, and are directed at both the insufficiency of the evidence to justify the findings, decision and judgment of the trial court as well as errors of law occurring at the trial in the admission and exclusion of evidence. After the service of the original brief and prior to the calling of the case for oral argument, appellant prepared, served and filed what he termed a "supplemental brief of appellant," in which he specifically enumerates the errors relied on for a reversal of the judgment, and it is this brief that respondent seeks to have stricken from the files. Respondent has furnished us with a great many authorities to the effect that a failure on the part of the appellant to assign errors is fatal to the appeal, and that in such a case the appellate court cannot and will not examine the transcript for the purpose of ascertaining whether or not error has been committed. *Purdy v. Steele*, 1 Idaho, 216, holds that "all exceptions in the court below will be treated as waived, unless the matters so excepted to are assigned as error in this court," and from the opinion in that case it seems that no assignment of error was ever made either in the trial court on motion for a new trial or contained in the statement or enumerated in the brief in this court. *United States v. Tidball* (Ariz.), 29 Pac. 385, *Sutherland v. Putman* (Ariz.), 24 Pac. 320, and *Charon-leau v. Shields & Price* (Ariz.), 76 Pac. 821, are all from the Arizona supreme court, and rest upon the peculiar statutes of that territory. An examination of these cases discloses the fact that there is a statute in Arizona requiring the assignment of errors to be filed with the clerk of the trial court prior to the printing of the transcript, and the supreme court has held that such statute is mandatory. *Haas v. Board of Commissioners*, 5

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Colo. 125, holds that a failure to file any assignment of errors in the appellate court, either at the time of filing the transcript or thereafter, is fatal, and that the appeal will be dismissed. There a court rule requires the appellant to assign errors at the time of filing the transcript of the record, and provides that the appeal or writ of error will be dismissed for failure to do so. *Rehberg v. Greiser*, 24 Mont. 487, 62 Pac. 820, and 63 Pac. 41, is from the supreme court of Montana, and is a case where the appeal was dismissed for failure to set out any specification of errors, and is founded on a rule very similar to paragraph 1 of rule 6 of this court; but the court there held that the filing of such an enumeration of errors was not jurisdictional, and in the course of opinion referred to the fact that in other cases the court had disallowed motions to dismiss for such failure. It was held, however, that the particular case then under consideration did not present such facts as would justify them in disallowing the motion. *Brovelli v. Bianchi*, 136 Cal. 612, 69 Pac. 416, simply holds that upon an appeal from an order denying a motion for a new trial "where the evidence is not pointed out in the brief of appellant and no suggestion made as to the respects wherein the evidence fails to support the findings," the court "will not endeavor to discover the respects wherein the evidence is insufficient, but will presume that it supports every material finding of fact." *Schroeder v. Schmidt*, 74 Cal. 459, 16 Pac. 243, holds that an "error committed in granting a nonsuit . . . cannot be reviewed on an appeal from an order refusing a new trial, unless it was excepted to on the trial and specified as error in the statement or bill of exceptions." The numerous other authorities cited by respondent on this point are practically to the same effect as those just reviewed. It does not appear from these authorities that the courts are inclined to refuse to examine a case on appeal where the errors have been assigned and specified in the statement on motion for new trial and are contained in the transcript on appeal, even though they are not specifically enumerated in the brief. In this case, however, appellant has substantially complied with the rule in filing his supplemental brief enumerating the errors prior to the case being called for argument in this court.

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Respondent also contends that the appeal from the order denying the motion for a new trial cannot be considered in this court on the ground that it has not been urged or assigned as error on appeal. Section 4427, Revised Statutes, allows an aggrieved party an exception as a matter of law to an order denying his motion for a new trial, and since the appellant had assigned his errors in the statement and bill of exceptions used on the hearing of the motion, and had pointed out the insufficiency of the evidence to support certain findings, as well as the errors of law committed at the trial, he is entitled now upon his appeal from such order to have those assignments of error examined and considered in this court. It is true that some of the courts, to whose decisions counsel have called our attention, have established a contrary rule; but our appellate practice is cumbersome enough at best, and we are not inclined to place such a construction on the statute and hold to such a technical observance of the rules of this court as will make appeals any more difficult of prosecution than they are at present.

For the foregoing reasons respondent's motion will be denied and the case will be examined on its merits.

This action was commenced by plaintiff, W. G. Whitney, praying for a decree of the court quieting his title in and to lots 1, 2, 3, 5 and 6, in section 22, township 7 north, range 1 west, Boise meridian, and situate in Boise and Canyon counties, and for a perpetual injunction against the defendant thereafter asserting any claim whatever in or to the premises described. The defendant answered denying plaintiff's right and title and setting up title in himself in and to an undivided one-half interest in the premises described in the complaint. In order to properly understand this case it is necessary to recite somewhat at length the history of the dealings and transactions between the plaintiff, Whitney, Willard White (defendant's grantor) and I. R. Beery (the grantor to both the plaintiff and White). The contract out of which all subsequent troubles seem to have grown was entered into on the seventh day of September, 1899, between the plaintiff Whitney and Willard White, and is as follows:

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"This agreement witnesseth: Whereas, W. G. Whitney and Willard White having acquired a dam, log storage and power site on the Payette river, at a point called the Black Rock Canyon about six miles above the town of Emmett, in Canyon County, Idaho, and,

"Whereas, it is proposed to secure sufficient funds with which to erect a dam at said site, about thirty feet in height, with a view to creating a large water-power to be used in sawing lumber, elevating water upon both sides of the Payette river, for the purpose of irrigation, and for generating electric power to be utilized for railway and such other purposes as may be found feasible,

"Now, therefore, in consideration of the premises, each of the parties hereto agrees to give his best efforts to the immediate accomplishment of the above-mentioned project, and does agree that the parties hereto are to own an equal interest in such undertaking, share and share alike.

"It is further agreed that in the event the said White shall fail to raise sufficient funds to construct said dam, or fails to make such progress as shall be satisfactory to said Whitney within one year from the date thereof, the said White agrees to assign all his right, title and interest in the same to said Whitney.

"Witness our hands and seals this 7th day of September, 1899.

W. GARRET WHITNEY.

"WILLARD WHITE.

"Witnessed by:

"BEN I. BLOCH."

According to the testimony, White, in pursuance of the term of the contract of September 7th, went east for the purpose of raising money and procuring a contract for the proposed dam site, and on the twenty-sixth day of December of the same year entered into a contract with I. R. Beery of Minneapolis, Minnesota, as follows:

"This agreement made and entered into this 26th day of December, in the year of our Lord one thousand eight hundred and ninety-nine.

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“Between I. R. Beery of Minneapolis, Minnesota, the party of the first part, and Willard White of Boise, Idaho, party of the second part,

“Witnesseth, that the said party of the first part for and in consideration of the covenants and agreements on the part of the said party of the second part hereinafter contained, agrees to sell and convey unto the said party of the second part, and the said second party agrees to buy all those certain lots, pieces and parcels of land situate in the counties of Canyon and Boise, in the state of Idaho, and more particularly described as follows, to wit: Lots one (1), two (2), three (3), five (5) and six (6) of Section twenty-two (22), Township seven (7) North, Range one (1) West, B. M., for the sum of six thousand dollars.

“And the said party of the second part in consideration of the premises agrees to pay to the said party of the first part the sum of six thousand dollars, to wit:

“One thousand dollars in cash on or before February 1st, 1900, and five thousand dollars in first mortgage bonds in a corporation to be formed for the purpose of developing a power plant at a point upon the above described property known as the Black Rock Canyon, said bonds to be issued upon said property and upon such improvements as shall be placed thereon.

“And the said party of the second part agrees to pay all state and county taxes or assessments of whatsoever nature which are now or may become due on the premises above described.

“In the event of failure to comply with the terms hereof by the said party of the second part, the said party of the first part shall be relieved from all obligations in law or equity to convey said property and the said party of the second part shall forfeit all right thereto at the option of the party of the first part. And the said party of the first part on receiving such payment at the time and in the manner above mentioned agrees to execute and deliver to the said party of the second part or to his assigns a good and sufficient deed for the conveying and assuring to the said party of the second part the title to the above described premises free and clear of encumbrances other than the taxes hereinbefore mentioned. And it is understood that the aforesaid stipulations are to apply to and bind the heirs, execu-

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tors, administrators and assigns of the respective parties and that the said party of the second part is to have immediate possession of said premises.

"In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

"I. R. BEERY.

"WILLARD WHITE."

Thereafter, and on the twenty-fifth day of January, 1900, I. R. Beery and wife made and executed their warranty deed to the entire tract of land and premises described in the complaint in this action, and in such deed named Willard White as the grantee, and on the date of its execution the deed was placed in the hands of grantee White, at the city of Minneapolis, and was thereafter by White brought back to the state of Idaho, and has ever since been in White's possession and control. As to whether or not the deed of January 25th was ever actually delivered within the contemplation of law is a vital question in this case.

The next important step in the course of these transactions occurred on April 25, 1900, when Beery and White entered into a new agreement which by its terms provided that it should take the place of the former agreement of date December 26th. The important part of the agreement of April 25th, and that which has any special bearing upon the matters in controversy in this action, is as follows:

"Witnesseth, that whereas I. R. Beery, party of the first part, is the equitable owner of the real property hereinafter described, while Willard White, party of the second part, holds the legal title thereto by virtue of a deed heretofore executed by the said I. R. Beery and wife, under agreement heretofore entered into by and between said Beery and said White, and

"Whereas, it is desired by the parties to enter into a new and different agreement at this time in relation thereto,

"Now, therefore, for and in consideration of the mutual covenants hereinafter contained, and to be by said parties paid, kept and performed, it is agreed: That said Willard White has this day become the owner, absolute, of the equitable as well

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as the legal title to a one-half interest, undivided, in the property hereinafter described for the consideration of seven hundred and fifty dollars (\$750.00), one hundred and fifty dollars of which said gross sum has this day been paid, the receipt whereof by said Beery is hereby acknowledged; one hundred dollars is to be paid on or before May 15th, 1900, and the remainder of said sum of seven hundred and fifty dollars, to wit, five hundred dollars, is to be paid on or before January 1st, 1901."

Thereafter, and on the thirteenth day of May, 1901, the plaintiff, Whitney, secured from Beery a quitclaim deed to the lands and premises in controversy, the title to which he seeks to quiet by this action, and which title is derived from Beery through the medium of this deed alone. On the seventh day of August, 1901, White executed and delivered a quitclaim deed of an undivided one-half interest in and to the property described, to R. M. Cobban and George H. Casey, and on September 27, 1902, Cobban and Casey, by a quitclaim deed, conveyed their undivided one-half interest to the defendant, Dewey. Dewey traces his title through a chain of quitclaim deeds back to the warranty deed executed by Beery and wife on January 25, 1900.

At the trial the court permitted the plaintiff to introduce the testimony of I. R. Beery and other witnesses, showing a parol agreement and understanding had between White and Beery at the time of the execution of the deed of January 25th, and by the terms of which agreement it is contended that the deed of January 25th was delivered upon conditions thereafter to be performed and complied with by the grantee, White, and on the failure to perform which no title should pass under the deed. The defendant objected to the introduction of this class of testimony upon the grounds that the complaint alleges that the deed was placed in the hands of White with the understanding that the same should take effect and pass title from Beery to White only upon a compliance by White with the terms and conditions of the contract of December 26th, and that to permit parol testimony would be to contradict a written contract, and for the further reason that parol evidence is not admissi-

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ble for the purpose of showing the terms and conditions under which a deed, absolute on its face, was delivered into the possession of White. The substance of the evidence given on this point is fairly stated by the grantor, Beery, in his testimony as follows:

"Mr. White first visited me about the 26th of December, 1899, when this contract was executed. Then he returned on the 25th of January, at the time we made the deed. At this time I executed and delivered to him this deed, placed it in his possession personally at the time he was in Minneapolis and he carried it back to Idaho. I placed it in his hands so that the matter could be closed up promptly in connection with the transferring of the property to the corporation that was contemplated; these bonds were to be paid and an issue of bonds on this property and power plant and ditches, etc., contemplated. I was to be paid when the matter was consummated and the bonds ready to be issued. The deed was placed in his hands to facilitate the matter and so that we all could save time. He could pay me when he used the deed just as though I sent the deed to him to hold. It was a matter of trust with me."

Other witnesses testified to subsequent statements made by White to the same effect. The deed of January 25th from Beery to White was without any condition or reservation whatever expressed on the face of the instrument, and so far as can be gathered from the indenture itself, it is absolute. It is admitted that this deed was delivered by the grantor into the personal and manual possession and control of the grantee, and passed completely from the control and direction of the grantor. The contention made by plaintiff on this point is about as follows: That under the agreement of December 26th, White was expected to form a corporation for the construction of a big dam on the Payette river with its site upon the lands in controversy for the purposes of power and irrigation, and that as soon as the corporation should be organized the title to this property should be conveyed to such corporation, and thereupon Beery should be paid the sum of \$1,000 and deliver \$5,000 worth of first mortgage bonds to be issued

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by such corporation in full payment for the property. And the plaintiff contends that the deed of January 25th was executed and delivered under the terms and conditions of the agreement of December 26th, and that it was mutually understood and agreed between the grantor and grantee at the time that the corporation should be formed, and that accordingly this deed was delivered to White in order to facilitate the transaction and enable White to immediately convey the property to the corporation and perfect the title and qualify the corporation to issue the bonds in payment of the balance of the purchase price.

As above observed, this deed was delivered to the grantee and contained upon its face no conditions whatever precedent to the vesting of title. Appellant insists that the facts disclosed in this case show an absolute delivery of the deed and that parol evidence was inadmissible to attach any condition to the vesting of title under such a deed.

It is a well-settled principle of law that a deed cannot be delivered by the grantor to the grantee therein named to be held by the grantee in escrow. If such thing be done the result is that title vests at once in the grantee. The holder of an escrow must be a third party, who for such purpose becomes the agent of both the grantor and grantee.

In 13 Cyclopaedia, 564, the writer of the text says: "A deed cannot be delivered as an escrow to the grantee, and a delivery which purports to be such will operate as an absolute one. This rule, however, applies only to those deeds which are upon their face complete contracts requiring nothing but delivery to make them perfect, and does not apply to those which upon their face import that something besides delivery is necessary to be done in order to make them complete." The writer cites many authorities in support of that text.

In 1 Devlin on Deeds, section 315, it is said: "A deed cannot be delivered to the grantee as an escrow. If it be delivered to him, it becomes an operative deed, freed from any condition not expressed in the deed itself, and it will vest the title in him, though this may be contrary to the intention of the parties. One of the grounds upon which this rule is based is that

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parol evidence is inadmissible to show that the deed was to take effect upon condition." The author thereupon proceeds to quote as a part of the text, and with approval, from the opinion of Harris, J., in *Lawton v. Sager*, 11 Barb. 349, in whose opinion the following language is used: "Whether a deed has been delivered or not is a question of fact upon which, from the very nature of the case, parol evidence is admissible. But whether a deed, when delivered, shall take effect absolutely or only upon the performance of some condition unexpressed therein, cannot be determined by parol evidence. To allow a deed absolute upon its face to be avoided by such evidence would be a dangerous violation of a cardinal rule of evidence."

In *Braman v. Bingham*, 26 N. Y. 483, the court of appeals said: "The reason given for the rule excluding parol evidence of a conditional delivery to the grantee applies to all cases where the delivery is designed to give effect to the deed, in any event, without the further act of the grantor. 'When the words are contrary to the act, which is the delivery, the words are of none effect.' (Coke's Littleton, 36a.) 'Because then a bare averment, without any writing, would make void every deed.' (Cro. Eliz. 884.) 'If I seal my deed and deliver it to the party himself, to whom it is made, as an escrow upon certain conditions, etc., in this case let the form of the words be what it will, the delivery is absolute, and the deed shall take effect as his deed presently.' (Sheppard's Touchstone, 59; *Whydon's Case*, Cro. Eliz. 520; Cruise's Digest, title 33, Deeds, c. 2, par. 80.) If a delivery to the grantee can be made subject to one parol condition, I see no ground of principle which can exclude any parol condition. The deed having been delivered to the grantee, I think the parol evidence that the delivery was conditional was properly excluded."

The authorities to the foregoing effect might be multiplied, of which the following appear to be some of the leading cases: *Blowitt v. Boornum*, 142 N. Y. 357, 40 Am. St. Rep. 600, 37 N. E. 120; *Darling v. Butler*, 45 Fed. 332, 10 L. R. A. 469; *Miller v. Fletcher*, 27 Gratt. 403, 21 Am. Rep. 359; *Richmond v. Morford*, 4 Wash. 337, 30 Pac. 242, 31 Pac. 513; *Hubbard v. Greely*, 84 Me. 340, 24 Atl. 799, 17 L. R. A. 511.

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In the latter case it was said: "An escrow is a deed delivered to a stranger, to be delivered by him to the grantee upon the performance of some condition, or the happening of some contingency, and the deed takes effect only upon the second delivery. Until then the title remains in the grantor. And if the delivery is in the first instance directly to the grantee, and he retains the possession of it, there can be no second delivery, and the deed must take effect on account of the first delivery, or it can never take effect at all. And if it takes effect at all, it must be according to its written terms. Oral conditions cannot be annexed to it. It will therefore be seen that a delivery to the grantee himself is utterly inconsistent with the idea of an escrow. And it is pretty well settled, by all the authorities, ancient and modern, that an attempt to thus deliver a deed as an escrow cannot be successful; that in all cases where such deliveries are made, the deeds take effect immediately and according to their terms divested of all oral conditions."

Counsel for respondent contend that while there was a manual delivery of the deed, there was no intention to pass title, and that on that theory of the case the evidence admitted was proper and competent to show such fact. While it is not directly contended that the grantee can hold a deed in escrow from his grantor, the argument of counsel as applied to the facts of this case would amount in the end to such a position. The leading authorities cited by respondent in support of this position are 9 Am. & Eng. Ency. of Law, 154; *Black v. Sharkey*, 104 Cal. 279, 37 Pac. 939; *Lee v. Richmond*, 90 Iowa, 695, 57 N. W. 613; *Steel v. Miller*, 40 Iowa, 403; *Bunn v. Stewart*, 183 Mo. 375, 81 S. W. 1091; *Hastings v. Vaughn*, 5 Cal. 315.

In 9 American and English Encyclopedia of Law, *supra*, under the heading of "What is Delivery—(c) A Question of Intention," the author says: "The real test of delivery is this: Did the grantor, by his acts or words, or both, intend to divest himself of title? If so, the deed is delivered." By the foregoing language we do not understand the writer to mean that where the question of the delivery of a deed arises, parol testimony may be introduced tending to show the intention of the

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parties to such an extent as to control the vesting of title contrary to the express written language of the deed itself; or, in other words, attach conditions to the deed, and, indeed, the authorities cited by the author in support of the text do not go to such an extent.

Counsel quote at length from *Black v. Sharkey*, *supra*, where the court uses language that would indicate the view that evidence might be introduced to prove that the parties did not intend the deed should take effect according to its terms; but it should be observed that in that case the only question under consideration, and the only one decided, was whether or not parol evidence might be introduced to show that the deed which had been duly executed and was found in the possession of the grantee had ever been in fact delivered. The opinion in that case is by the court commissioners, and makes no reference to the former case of *Mowry v. Heney*, 36 Cal. 471, 25 Pac. 17. The latter opinion was by the court, and it was there expressly held that "when an absolute deed has been delivered to the grantee, the title becomes vested free from any condition, and its operation cannot be defeated by parol proof of an intention on the part of the grantor, known to the grantee, that it should not take effect except in event of the grantor's death; nor is parol evidence admissible to show that the delivery of the deed to the grantee was subject to any condition not expressed therein." We cannot, therefore, view the Black-Sharkey case as in any way overruling or modifying *Mowry v. Heney*. *Hastings v. Vaughn* was to the same effect as the latter case.

In *Lee v. Richmond*, the Iowa court held that there had been no delivery of the deed and that the instrument had reached the hands of the grantee not by way of delivery as a consummation of the transaction, but for inspection and approval of another person; the court saying: "The deed was not to be regarded as delivered unless the settlement attempted was approved by Fulton, and, as it was not approved by him, there was never, in law, any delivery, and the deed is without effect."

Steele v. Miller was a suit apparently founded on fraud in the transaction, and the court held that the minds of the parties had never met on the question of a delivery, and that no

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legal delivery ever took place. The evidence in the case appears, however, to be directed at the specific question of delivery alone.

In *Bunn v. Stewart*, a father appears to have executed deeds in favor of certain of his children and grandchildren, with the intention of retaining them until such future time as he saw fit to deliver them in the distribution of his estate, but later he became entangled in divorce proceedings and placed certain of the deeds in controversy in the hands of two of the grantees with instructions to hold them until he called for their return, but the grantees, contrary to his instructions, placed them of record, and the supreme court of Missouri held upon that state of facts that no legal delivery ever took place.

The extent to which the intention of the parties enters into the act of delivery of a deed is very fairly stated by the author in 13 Cyclopaedia, 561, and the authorities cited in support thereof. It is beyond controversy that the evidence of delivery must come from without the deed. In other words, a deed never shows upon its face nor by the terms thereof a delivery, and parol evidence thereof must necessarily be admitted when the question of delivery arises. And it will, perhaps, often be difficult to accurately determine the exact extent to which the intention of the parties is admissible as to the ultimate result of divesting the grantor of title, but such testimony should never be considered by the court to the extent of governing and controlling the express terms of the instrument where it is clear that a delivery has been made, even though the parties have mistakenly supposed the legal effect would be different. Of course such evidence would be competent if it should be shown that under no circumstances and in no event and under no conditions was the title ever to pass from the grantor; because such a showing would disprove a legal delivery. It would show a failure to consummate the contract and sale of the property. But where it is the intention of the parties for the title to pass upon *any contingency* or in *any event* from the grantor to the grantee and the deed is delivered to the grantee, absolute on its face, then the vesting of title becomes a question

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of law and must date from the delivery; and since the grantee cannot act as the agent of both himself and the grantor for the purpose of a second delivery, title must necessarily have passed upon the original delivery. This rule is very clearly stated by the New York court in *Braham v. Bingham, supra*, where it was said: "The reason given for the rule excluding parol evidence of a conditional delivery to the grantee applies to all cases where the delivery is designed to give effect to the deed, in any event, without the further act of the grantor." (See, also, *Hubbard v. Creely, supra*.)

In this case, giving the respondent the most favorable construction that can possibly be placed upon the evidence, it was the intention of the grantor, Beery, to vest title in his grantee, White, so as to enable the grantee to transfer a perfect title to the proposed corporation. Beery expected to receive \$5,000 worth of first mortgage bonds of the corporation as a balance of payment of the purchase price of the property. Such bonds would have been valueless to Beery unless the corporation could secure a good and perfect title to the property on which the mortgage bonds were to issue. Now, then, the question arises: Could the grantor, Beery, by warranty deed, absolute on its face, convey such a title to his grantee as would enable the grantee to pass a good and perfect title to the corporation, and at the same time attach such parol conditions to the deed upon its delivery as to preclude his grantee from conveying and transferring an equally good title to any other person or corporation? We must answer this question unqualifiedly in the negative. If the grantor, Beery, desired to limit the right of his grantee to transfer this property to any particular person or corporation, it was necessary to express that limitation upon the face of the instrument. For the foregoing reasons we are clearly satisfied that the court erred in receiving and considering the evidence offered for the purpose of showing a failure to vest title in the grantee.

There is another significant fact in this case, and one which alone would prevent the plaintiff from quieting his title under a quitclaim deed to the undivided one-half interest held by him, and that reason is found in the agreement of April 25th. It is there recited that the parties desire to enter into a "new and

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different agreement," and the agreement provides "that, whereas, I. R. Beery, party of the first part, is the equitable owner of the real property hereinafter described, while Willard White, party of the second part, holds the legal title thereto by virtue of a deed heretofore executed. . . . Now, therefore, . . . it is agreed that said Willard White, has this day become the owner, absolute, of the equitable as well as the legal title to a one-half interest, undivided, in the property hereinafter described." It readily appears from the provisions of this agreement that whatever may have been the understandings and agreements between Beery and White, at the time of the delivery of the deed, thereafter they adjusted those matters, entered into a new agreement, and Beery ratified and confirmed the delivery of the deed at least to the extent of an undivided one-half interest; and, consequently, at the time of the execution of the quitclaim deed to Whitney, Beery had no right, title or interest in and to such undivided interest in this property. Even though a valid delivery of the deed had not been made at the time of its execution, it is settled law that the grantor may thereafter ratify the wrongful taking of a deed after he has complete knowledge of the facts of the taking and thereby perfect the title. (9 Am. & Eng. Ency. of Law, 155, and authorities cited; 13 Cyc. 565, and notes.)

It has been suggested that since the appellant takes his title by quitclaim deed, he is for that reason chargeable with notice that the title of his grantor is doubtful, and that he is therefore not a *bona fide* purchaser. This appears to be conceded by counsel, but the same principle applies with equal force to the respondent who takes title likewise by quitclaim deed. Under this line of authorities both parties would be equally chargeable with notice of defects in their grantor's title. (9 Am. & Eng. Ency. of Law, 2d ed., 106, and notes; *Leland v. Isenbeck*, 1 Idaho, 469; *Butte Hdw. Co. v. Frank*, 25 Mont. 344, 65 Pac. 4; *Anderson v. Thunder Bay Boom Co.*, 57 Mich. 216, 23 N. W. 776; *Wetzstein v. Largey*, 27 Mont. 212, 70 Pac. 717; *Dickerson v. Calgore*, 100 U. S. 578, 25 L. ed. 618.) It is doubtful, however, if such a rule could or ought to prevail under the recording laws of this state.

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Respondent contends that even though it be conceded that title passed from Beery to White, nevertheless, under the partnership agreement of September 7th, between White and Whitney, White was unable to part with any title to anyone other than Whitney himself. This contention is based upon that clause in the contract of September 7th, reading as follows: "It is further agreed that in the event that said White so fails to raise sufficient funds to construct such dam, or fails to make such progress as shall be satisfactory to said Whitney within one year from the date hereof, the said White agrees to assign all his right, title and interest in the same to said Whitney." It is conceded that White did not raise the necessary funds within the time prescribed, but it is equally true that the two, White and Whitney, continued in the possession of the property and to some extent operated upon the property for considerable time after the expiration of the year. White never assigned his interest to Whitney, nor does it appear that Whitney ever demanded that he do so except to demand that White convey to him an interest acquired under the deed of January 25th. The appellant in this case only claims an undivided one-half interest in the property. He is the successor in interest of White. The respondent acquired a quitclaim deed from Beery to the entire property. He must therefore, so far at least as is disclosed by this record, own the other undivided one-half interest in the property. They are therefore on equal footing. A rule which in equity would preclude White from acquiring an interest in the property to the exclusion of his partner, Whitney, would apply with equal force to Whitney. This is not an action by the plaintiff to compel White or his grantor with notice, to assign any interest acquired under the partnership agreement, and as to whether or not an agreement such as the one above quoted stipulating for assignment could be made the basis upon which a court of equity would declare a forfeiture, is a matter on which we are not required in this case to express any opinion.

The judgment of the lower court will be reversed and the cause remanded for further proceedings in harmony with the

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views herein expressed. So ordered. Costs awarded to appellant.

Stockslager, C. J., and Sullivan, J., concur.

ON PETITION FOR REHEARING.

(May 31, 1905.)

AILSHIE, J.—Respondent's petition for a rehearing in this case does not present anything new or any question not originally considered by us, though it again discusses some questions which we did not deem it necessary to pass upon in the original opinion. The persistence with which counsel insists that we have mistaken both the law and the equities in this case has led us to again examine the case at length, and, after so doing, we are unable to see wherein the judgment of the trial court could be affirmed. It must necessarily be true that the court cannot see either the law or the equities of a case in the same light in which they are viewed by counsel for the losing party; and it may be, indeed, that sometimes the court mistakes them entirely. However, notwithstanding counsel's studied argument to the contrary, we are convinced that this is not a case where we have mistaken either.

We are asked in the petition to announce more definitely the position of the court as to what title White took under the deed of January 25th. The only interest the appellant claims, and for which he is litigating, is an undivided one-half interest in this property, and we have held that under the record he is entitled to such interest. Under the deed of January 25th, the entire legal title passed from Beery to White. Under the contract of April 25th, Beery recognized that the entire legal title had passed from him and that all the interest he retained in the property was an equity. What that equity was is not recited, but we would infer from the record that it consisted in a vendor's lien for the unpaid purchase price. By that contract Beery parted absolutely with all of his equity in an undivided one-half interest in this property. It therefore follows that after the execution of the contract of April 25, 1900, that both the legal title to the entire property and equitable title to an

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undivided one-half interest therein was vested in White, and that by the terms of that agreement White recognized a remaining equity in Beery to the other undivided half interest in this property, and for that equity agreed to pay the sum of \$1,750 on or before January 1, 1901. White does not appear to have paid this sum or to have received any further deed from Beery to his equity in this remaining half interest. On the contrary, Whitney appears to have received a deed from Beery for the entire tract of land on May 13, 1901. So far as the facts, therefore, disclosed by this record are concerned, we conclude that the appellant Dewey now owns an undivided one-half interest in the property as described in the deed taken by him and Whitney the other one-half interest.

It is suggested that White acquired all the interest he obtained in this property while sustaining a fiduciary relation toward Whitney, his partner, under the agreement of September 7, 1899. This we think is correct, and it is equally true with reference to Whitney. But counsel contends that this relation had been terminated prior to the date on which Whitney acquired his deed. To this we cannot assent. The contract of September 7th was made for a period of one year, and yet respondent repeatedly admits in his testimony that they continued to do business in all respects as though it were still in force and effect from the date upon which it was executed until the 1st of April, 1901, and that all that then occurred looking to the termination of the partnership relation consisted merely in respondent notifying White that he was going to declare the matter off. It takes more than a notice of this kind to dissolve a partnership and terminate a trust or fiduciary relation existing between partners. If White acquired the entire title, one-half thereof would undoubtedly have inured to the benefit of his partner, Whitney. If, on the other hand, he acquired only a one-half interest in the property and in the meanwhile and during the existence of that relation, and in pursuance thereof, his partner acquired the other half interest, then such interests and equities must offset each other and the obligations resting upon them by reason of such relation will be met in that respect.

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Again, it is insisted by counsel that White and his grantee are estopped to now assert title to this property on account of the declarations and statements made by White to Whitney and others after receiving the deed from Beery. These statements were of the same character as the testimony of Beery concerning the conditions imposed on White upon the delivery of the deed. It is not contended by appellant that the statements which are claimed to have been made by White after receiving this deed were not true. It would appear from this record that if he made these statements, he was, as a matter of fact, only stating what had actually occurred. But the trouble is that the law will not permit parol testimony of such matters to defeat the vesting of title. If, therefore, the statements he made were true concerning such matters, they were not of such a character as to prejudice the respondent or in any way to deceive him as to the facts or mislead him in his action or conduct. The respondent is presumed to have known, as a matter of law, that such conditions could not be attached to a deed upon its delivery to the grantee, and having had full notice of the execution of the deed and of the agreements and contracts in relation thereto, he was, as a matter of law, neither deceived nor prejudiced by the statements or declarations so made. So long as he obtains his share as a partner in the fruits of the enterprise, he has no cause for complaint.

It should be further observed that it nowhere appears that any of these statements or declarations made by White were subsequent to the contract of April 25th. It would appear, however, from the record that they must have been made prior to that time. It seems to us from a reading of the record before us that respondent must have understood that he and his associate White were acquiring title by virtue of the deed of January 25th and contract of April 25th, or else he would not have continued to occupy and improve the property for a period of more than a year thereafter. They do not appear to have had any other contract or agreement whereby they could acquire the title to that property, as they had failed to make their payments under the contract of December 26th, and that contract had been superseded by the contract of April 25th. It

Points decided.

does not seem reasonable that respondent would have spent a year's time and labor on this property unless he felt that he had title or legal and binding obligations whereby he or he and his associate could acquire title thereto.

Other questions were argued by respondent in his brief and have also been presented in his petition for rehearing, but we do not think they properly arise upon this appeal, nor is the record in such a condition as to justify us in discussing them. Besides, a legal determination of some of the points urged would necessitate other parties to the action in order to give them any binding effect. We find no reason for granting a rehearing in this case, and it will therefore be denied.

Stockslager, C. J., and Sullivan, J., concur.

(February 27, 1905.)

RIDENBAUGH v. THAYER.

[80 Pac. 229.]

SPECIFIC PERFORMANCE.

1. Where it is shown by the complaint, which is not denied, that by written contract T. agreed to furnish R. at a place named in the contract two thousand five hundred cords of wood, R. to furnish all money necessary to chop, haul, boom and deliver such wood; that in pursuance of such contract R. did, at all times, comply with all the terms and conditions of the contract; that after the delivery of two hundred and fifty cords of wood by the administratrix of the estate of T. and after such administratrix had agreed to carry out the terms and conditions of such contract, she refused to further comply with the contract unless R. would release five hundred cords of such wood from delivery to R., he having furnished her large sums of money to complete the contract of T., *held*, that a decree for specific performance will be enforced in a court of equity.

(Syllabus by the court.)

APPEAL from the District Court of Ada County. Honorable George H. Stewart, Judge.

Opinion of the Court—Stockslager, C. J.

Action to enforce specific performance of a contract. Judgment for plaintiff, from which defendant appeals. Judgment affirmed.

The facts are stated in the opinion.

S. L. Tipton, Karl Paine and Charles M. Kahn, for Appellant.

All the authorities cited in their brief are cited and commented on in the opinion.

Fremont Wood, for Respondent, cites no authorities not found in the opinion.

STOCKSLAGER, C. J.—The plaintiff commenced his action in the district court of Ada county to compel the specific performance of a certain contract alleged to have been entered into between plaintiff, doing business as the Shaw Lumber Company and Orin Thayer. The contract was in writing; a copy of it is exhibit "A" to plaintiff's complaint herein, and is dated the fifth day of October, 1903.

It is next shown by the complaint that on or about May 23, 1904, Orin Thayer died intestate, and thereafter, about June 15, 1904, the defendant in this action was appointed administratrix of his said estate by the probate court of Ada county, and that said letters of administration have never been revoked.

The fourth allegation of the complaint is that said Orin Thayer, in accordance with the terms of the contract, proceeded to procure the necessary cordwood along Moores creek and Grimes creek in Boise county, Idaho; that said wood was procured by said Thayer by purchase, cutting and removal, and the plaintiff, during the lifetime of said Thayer, advanced for the use of said Thayer for carrying on the work of chopping, purchasing and securing said wood, the sum of \$4,500, the same being the amount demanded by said Thayer for said work; that at the time of the death of said Thayer said wood was in the timber where cut and it became necessary to move the same in order to utilize the high water in Grimes creek and Moores creek for running said cordwood; that after the death

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of said Thayer it was agreed between plaintiff and said defendant, both in her personal capacity and afterward in her representative capacity as administratrix, that the terms of said written contract should be carried out, and said cordwood cut and procured as aforesaid, delivered under the terms of said contract to plaintiff, and in pursuance of said last-mentioned agreement and understanding between plaintiff and defendant, this plaintiff has advanced for the account of said defendant in hauling and driving said cordwood, the sum of about \$4,250, making in the aggregate the sum of \$8,750 advanced by plaintiff under said contract, but plaintiff is informed and believes, and therefore, on his information and belief, alleges, that there is less than two thousand cords of wood subject to delivery under said contract, and that he has already paid more than the contract price therefor.

The fifth allegation is that plaintiff has well and truly kept and performed each and every provision of the contract on his part; nevertheless, defendant, after commencing the delivery of said wood in the yard of this plaintiff, has caused the delivery thereof to be stopped, and has demanded of plaintiff that he release from the terms of said contract five hundred cords of said wood, and upon the refusal of plaintiff to consent to said release, and after plaintiff had paid all of said money on said contract price, said defendant has refused to deliver more wood, has abandoned the said wood drive in the Boise river, and is now permitting the same to gather and accumulate in great quantities against plaintiff's boom in said river and in other places along said river, and unless given immediate protection and removed from said boom and cared for, the said boom will be broken and said cordwood will become nearly a total loss.

The sixth allegation is that under and in accordance with said contract plaintiff furnished the boom provided for therein, and the same is anchored upon the Boise river near the foot of Eighth street, in Boise City, but said defendant, through her agents, has taken possession of said wood and said premises and refuses to protect or permit plaintiff to protect the same, and defendant also refuses to run said wood or per-

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mit this plaintiff to run the same, and deliver the same into his yard, although plaintiff has offered to care for and haul, or assist in hauling said wood.

The seventh allegation is that about two hundred and fifty cords of said wood have been delivered in the yard according to said contract; that between three hundred and four hundred cords are now against and in the immediate vicinity of said boom, and the remainder of said wood, about thirteen hundred or fourteen hundred cords, between said boom and a point about seven miles up the Boise river.

The eighth allegation is that at noon on the 30th inst. defendant stopped all work upon said wood drive, and the wood in the river is now entirely unprotected except by the boom aforesaid; that said boom will give way in case of a slight rise in the river, which is liable to occur at any minute, either from showers or from lowering of water in the irrigating ditches, where the diversion points are above said boom, and unless said boom is given almost immediate attention and said wood removed, the same will go out and said wood become a total loss. Plaintiff is informed and believes, and therefore upon information and belief alleges, that the banks near the northern anchorage of said boom have commenced to wash and that the piers holding said boom have commenced to settle on account of the great pressure thereon, and unless said wood is immediately removed, said boom will wash out and said wood pass down the river beyond the control of either of the parties hereto.

The ninth allegation is that plaintiff has offered to incur all expenses of running, driving, holding and removing said wood in addition to the payments already made, but defendant has declined to permit plaintiff to in any way interfere with, have or protect said wood, etc.

The tenth allegation is that the estate of Orin Thayer now is, and was at the time of his death, insolvent, and defendant, administratrix, personally and in her representative capacity, is insolvent and unable to respond in damages for failure to deliver said wood, and for that reason plaintiff avers that he has no plain, speedy or adequate remedy at law; that unless compelled by an order of this court to immediately deliver said

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wood and protect and care for the same, now in the Boise river, said wood will become a total loss and plaintiff will suffer great and irreparable injury thereby. Plaintiff then tenders and offers with his own teams and his own men to complete the driving of said wood at the actual cost thereof, and to pile said wood in his yard in separate piles so that the wood now undelivered may be kept segregated from all other wood.

The eleventh alleges that the writ of replevin or claim and delivery would be unavailing herein on account of the great expense which would necessarily be incurred by an officer in gathering up, hauling and caring for said property, and on account of the insolvency of said estate said expense would be an additional expense account and all fall upon the plaintiff without any recourse therefor upon the defendant.

This complaint is followed by a prayer for specific performance, and an order of injunction compelling defendant, her agents and attorneys, to drive, boom and deliver said cordwood, and upon their failure so to do to permit plaintiff, his agents and attorneys together, to drive, boom and deliver said wood.

Exhibit "A" provides that Orin Thayer, for and in consideration of the promises and agreements of said Shaw Lumber Company hereinafter set forth, agrees to deliver to said Shaw Lumber Company in the summer of 1904, as soon as the season and the state of the water in the Boise river and its tributaries will permit, two thousand five hundred cords of wood, more or less, the same cut from live timber, four feet long and convenient size, from pine or fir. Said cordwood to be in all respects good, sound, smooth, straight, merchantable wood. Said cordwood and the whole thereof is to be delivered and corded in straight, compact piles, ten feet four inches high, in the yard of said Shaw Lumber Company, in Boise, Idaho, four inches to be allowed for settling.

"In consideration of the foregoing, the said Shaw Lumber Company, agreed to pay the said Orin Thayer the sum of \$4.25 per cord of one hundred and twenty-eight feet—cubic—as follows: The said Shaw Lumber Company is to advance for the use of said Thayer such sum of money as may be necessary,

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from time to time, to carry on work of chopping, hauling and driving said cordwood while the work is being prosecuted. Any balance that may be due said Thayer to be paid when all of said cordwood is delivered and piled in good condition in the yard of said Shaw Lumber Company as hereinbefore set forth.

"The Shaw Lumber Company further agrees to furnish for the use of said Thayer, in securing and driving said cordwood, all booms, boats, tools and utensils connected with the wood business now owned by the said Shaw Lumber Company, the same to be furnished to the said Orin Thayer free of charge for driving said wood for said Shaw Lumber Company as hereinbefore mentioned. The said Orin Thayer agrees to put said boom, etc., in the place where found, at his own expense and in good condition. The Shaw Lumber Company further agrees to pay any and all taxes that may be levied and assessed against said cordwood and the whole thereof."

To this complaint a demurrer was filed, to wit: "That said complaint does not state facts sufficient to constitute a cause of action." On September 3, 1904, this demurrer was overruled. Defendant failing to further plead, on the eighth day of December, 1904, evidence was introduced on behalf of plaintiff and judgment rendered finding all the allegations of the complaint to be true, that plaintiff had paid out, under the terms of the contract, \$10,282.25, and has received eighteen hundred and seventy and one-fourth cords of wood; that plaintiff is entitled to the specific performance of the contract on the part of Mary Thayer as administratrix. That the preliminary, mandatory injunction heretofore issued be continued and made perpetual, and that plaintiff is the owner of and entitled to the possession of the cordwood described in the complaint.

On this record it is insisted by counsel for appellant that respondent's right to an injunction, being dependent upon his right to a decree of specific performance, reduces the issue to the single question, Is respondent entitled to such decree? "Respondent contends that he is entitled to have the contract specifically enforced for two reasons: First, that the defendant and the estate of which she is administratrix are insolvent.

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Secondly, that respondent has no plain, speedy or adequate remedy at law.”

It is then insisted that this action cannot be maintained—there being no equity in the bill urging that the rule of law is well established that contracts relating to personal property of the nature of cordwood will not be specifically enforced. “That mere insolvency furnishes no independent grounds for equity jurisdiction.” “That respondent’s remedy is an action for damages at law.” We agree with counsel for appellant that in actions to enforce the specific performance of contracts of the character before us in the absence of other equities, a mere declaration that the defendant is insolvent or that he has no plain, speedy or adequate remedy at law will not entitle him to aid from a court of equity, his remedy being an action for damages. This being true, the important question to determine is whether plaintiff by his complaint brings himself within the rule for equitable relief. We find very respectable authorities on both sides of this question; however, we think it is settled beyond reasonable controversy that as a general rule courts of equitable jurisdiction will not decree the specific performance of contracts relating to chattels.

Mr. Pomeroy, in his excellent work on Specific Performance of Contracts (second edition), 66, discusses this question, and in section 48 says: “Where the rights of the party plaintiff under a contract will be fully satisfied by an account of profits and a payment of the sum found due thereby, and there is no obstacle to the recovery of such amount at law, a suit for a specific performance cannot be maintained.” In section 47 under the head of “Contracts Concerning Chattels,” the same author says: “The description of the general nature of specific performance and of the equitable right to it will be completed by a brief discussion of the principle that it cannot be granted when the legal remedy of damages is sufficient, that is, practicable and adequate. . . . It is the fundamental principle regulating the exercise of this equitable jurisdiction that whenever the legal remedy of damages is sufficient equity will not interfere and the specific performance will be refused.”

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Our attention is called to *Brady v. Yost*, 6 Idaho, 282, 55 Pac. 545. It is said in this case that, "As a general rule equity will not decree a specific performance of a contract relating to chattels. But there are well-defined exceptions to the general rule. Equity will decree a specific performance of a contract when damages at law will not afford a complete and adequate remedy."

Mr. Waterman in his work on Specific Performance of Contracts, in section 88, discussing the question, says: "It is incumbent upon the plaintiff to show that he cannot be indemnified in damages for the breach of the contract, and if he omit to allege, or it does not appear from the facts disclosed in the bill, that he has not a complete remedy at law, the defendant may demur to the bill on that ground."

In *Senter v. Davis*, 38 Cal. 450, Mr. Justice Sanderson, speaking for the court, says: "The jurisdiction of a court of equity to decree specific performance does not turn at all upon the question whether the contract relates to real or personal property, but altogether upon the question whether the breach complained of can be adequately compensated in damages. If it can, the plaintiff's remedy is at law only; if not, he may go into a court of equity which will grant full redress by compelling specific performance on the part of the defendant."

In volume 26, American and English Encyclopedia of Law, 103, in discussing personal property contracts, the author says: "a. It has been stated as a general rule that equity will not enforce contracts relating to personal property, but it will recognize that this rule is general only in so far as it may be stated generally that for the breach of a contract relating to chattels, damages at law are adequate, and that therefore whether or not equity will enforce personal property contracts is after all dependent upon the same doctrines as control the jurisdiction of chancery in other cases." "b. Contracts for the sale of goods possessing an easily ascertainable market value, as cotton or wheat or ordinary merchandise easily found in the market, will not be specifically enforced; the only relief for the breach of such contracts lies in damages at law."

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Mr. Pomeroy, in volume 3, sections 1402, 2156 (second edition), Equity Jurisprudence, in discussing the doctrine of equity courts where chattels are involved, says: "On the contrary, the doctrine is equally well settled that equity will not in general decree the specific performance of contracts concerning chattels because their money value recovered as damages will enable the party to purchase others in the market of like kind and quality." It will be observed that all those authorities are based on the theory that a judgment at law may be enforced and the plaintiff placed in the position to take the money thus obtained on his judgment and purchase like articles in the market. The exception to this rule runs all through the authorities that if the articles contracted for possess rare value or cannot be obtained in the open market, then a court of equity will assume jurisdiction and by its decree enforce the specific performance of the contract. We are of the opinion that if it is shown by the complaint that a judgment at law would be valueless to the plaintiff by reason of the inability of the defendant to respond in damages, then he is entitled to equitable relief, if other equities are shown in his bill.

This brings us to a discussion of the tenth allegation of the complaint, "That the estate of Orin Thayer now is, and at the time of his death was, insolvent, and that the said administratrix, both personally and in her representative capacity, is insolvent, and unable to respond in damages for failure to deliver said wood." This allegation is admitted to be true by the demurrer; hence the question is: Has the plaintiff brought himself within the jurisdiction of the court to grant equitable relief when this allegation is construed in connection with the contract and in the light of all other alleged equities in the case? We have seen that insolvency standing alone will not authorize the specific enforcement of a contract for the sale of chattels, and unless the plaintiff shows other equities in his bill he cannot have his contract enforced in equity.

It is earnestly urged by counsel for appellant that this is the controlling question in the case; in other words, that unless the plaintiff is entitled to equitable relief on the ground of insolvency alone, he cannot recover, as there are no other equi-

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ties disclosed by the complaint. We are inclined to agree with this contention, and (if it be true that insolvency stands alone as the only real reason urged in plaintiff's complaint for equitable relief, then he must fail in this action. The following authorities cited by counsel for appellant support this contention: 26 Am. & Eng. Ency. of Law, 2d ed., 19; *Strange v. Richmond F. & C. R. Co. et al.* (Va.), 93 Fed. 74, 75; *Lasar v. Baldrige*, 32 Mo. App. 366; *Townsend v. Fenton*, 32 Minn. 484, 485, 21 N. W. 726; *Miller v. Lorentz et al.*, 39 W. Va. 174, 19 N. E. 391; *McLaughlin v. Piatti*, 27 Cal. 463; *Crawford v. Bradford*, 23 Fla. 406, 2 South. 783; *Heilman v. Union Canal Co.*, 37 Pa. St. 100; *Cincinnati etc. R. R. Co. v. Washburn*, 25 Ind. 261; *McConnell v. Dickson*, 43 Ill. 99.

Counsel for respondent insists that "the contract being a mutual one, one party agreeing to deliver two thousand five hundred cords of wood, the other agreeing to furnish the necessary money to carry on the work of chopping, hauling and driving said cordwood while the work was being executed; that by the terms of the agreement there was a trust relation existing between plaintiff and Thayer from the time the first money was advanced by plaintiff."

Mr. Justice Wolverton, of the Oregon supreme court, in a very recent decision in *Livesley v. Johnston*, reported in 76 Pac. 946, discusses, among others, the one before us for determination. In this case the contract was for the delivery of hops raised by the defendant for five consecutive years, and provided when and where such hops were to be delivered, how baled, etc. The plaintiff agreed to advance a certain specified sum of money each year in the months of April, May and June, and at picking time four and one-half cents per pound for picking purposes. The contract provided for a lien upon the property for all such advances.

The plaintiff alleged in the complaint that as part consideration for the contract they had paid defendant the sum of \$1 and surrendered up and delivered to defendant certain promissory notes due to plaintiff aggregating in value \$650. Defendant refused to deliver the hops and notified plaintiff he would no longer be bound by the contract. The complaint alleged

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that defendant is wholly insolvent and unable to respond in damages for the breach of his agreement and plaintiffs have no plain, speedy and adequate remedy at law. With reference to the power of a court of equity to decree specific performance of a contract involving chattels, it is said: "It may be said that equity will not ordinarily grant relief for the specific delivery of chattels, because it is generally considered that the plaintiff has a plain, speedy and adequate remedy at law for damages for withholding them. The interposition of equity is withheld except upon this particular ground, as its jurisdiction is ample to decree the specific performance of an agreement relative to personalty as it is one relative to realty." In support of this doctrine he cites *Sullivan v. Tuck*, 1 Md. Ch. 59; *Frue v. Houghton*, 6 Colo. 318; *Doff v. Fisher*, 15 Cal. 376; *Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. ed. 152; *Mason v. Patterson*, 74 Ill. 191; *Kirksay v. Fike*, 27 Ala. 383, 62 Am. Dec. 678; *Barnes v. Barnes*, 65 N. C. 261. The opinion then proceeds as follows: "The remedy at law, however, which will bar such relief must be as practical and efficient to the end of justice and its prompt administration as in equity, or, to employ the language of Mr. Chief Justice Fuller in *Cormley v. Clark*, 134 U. S. 338, 339, 10 Sup. Ct. Rep. 554, 557, 33 L. ed. 909: 'The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would afford under the same circumstance';" citing *South Portland L. Co. v. Munger*, 36 Or. 557, 54 Pac. 815, 60 Pac. 5; *Benson v. Keller*, 37 Or. 120, 60 Pac. 918; *Wollenberg v. Rose*, 41 Or. 316, 68 Pac. 804; *Brett v. Warnick*, 44 Or. 511, 102 Am. St. Rep. 639, 75 Pac. 1061.

"When, therefore, an award of damages would not put the party seeking equitable relief for the delivery of personalty in a situation as beneficial as if the agreement were specifically performed, or where compensation and damages would fall short of the redress to which he is entitled, the jurisdiction is properly invoked; otherwise not; citing *Frue v. Houghton*, *supra*; *Avery v. Ryan*, 74 Wis. 591, 43 N. W. 317; *McGowin v. Remington*, 12 Pa. St. 56, 51 Am. Dec. 584."

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Discussing the question of insolvency it is said: "And it may be further observed that the insolvency of the party against whom relief is sought, standing alone, will not confer jurisdiction to enforce specific performance in this class of cases; there must be some other element or principle or equity cognizant upon which the remedy is invoked." (Citing authorities.) "The fact of insolvency, when combined with other causes of equitable interposition, may, however, become a potent or even controlling factor in determining the fact of jurisdiction." The principle is well settled by Mr. Justice Thompson in *Heilman v. Union Canal Co.*, 37 Pa. St. 100, 104, as follows: "The fact, if it be so, that this remedy may not be successful in realizing the fruits of a recovery at law, on account of the insolvency of the defendants, is not of itself a ground for equitable interference. The remedy is to be looked at. If it exists and is ordinarily adequate, its possible want of success is not a consideration. It is not intended here to say that insolvency is never a consideration moving a chancellor. It frequently does, but not alone. The equitable remedy must exist independently. In balancing cases, it is a consideration that gives preponderance to the remedy; citing *Clark v. Flint*, 22 Pick, 231, 33 Am. Dec. 733; *Parker v. Garrison*, 61 Ill. 250."

c/ In closing on this branch of the case, Mr. Justice Wolverton says: "We are not to be understood as holding that the defendant may ~~not~~ be required to perform the labor or carry on the project of producing the crops, but, after they have been produced and the plaintiffs have contributed to their production as required by the terms of the agreement, or have at all times been ready and willing to do so and have only been deterred therefrom by the acts of Johnston, they are entitled to have specific performance in delivery of the amount of the crops so agreed to be delivered."

In *Johnson v. Brooks*, 93 N. Y. 337, Mr. Justice Danforth discusses the question of specific performance of a contract relating alone to chattels, and says: "But while it may be conceded that in general a court of equity will not take upon itself to invoke such decree where chattel property alone is concerned, its jurisdiction to do so is no longer to be doubted, and it is

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believed that no good reason exists against its exercise in any case where compensation in damages would not furnish a complete and satisfactory remedy; citing *Phillips v. Berger*, 2 Barb. 609; *Cushman v. Thayer Mfg. Jewelry Co.*, 76 N. Y. 365, 32 Am. Rep. 315; Pomeroy on Specific Performance, secs. 16-18; Story's Equity Jurisprudence, secs. 716, 731. Indeed this learned author (Story's Equity Jurisprudence, sec. 717a) says: "It is against conscience that a party should have a right of election whether he would perform his covenant or only pay damages for the breach of it; but, on the other hand, he adds there is no reasonable objection to allowing the other party, who is injured by the breach to have an election either to take damages at law or to have a specific performance in equity."

In the case of *Cushman v. Thayer Mfg. Jewelry Co.*, 76 N. Y. 365, 32 Am. Rep. 315, the plaintiff brought action to compel defendant to transfer upon its books certain shares of stock to plaintiff and to issue a new certificate of the same to her. Miller, J., speaking for the court, says: "While the general rule is for courts of equity not to entertain jurisdiction for a specific performance on the sale of stock, this rule is limited to cases where a compensation in damages would furnish a complete and satisfactory remedy." A recovery of damages would furnish inadequate compensation; the remedy by *mandamus* cannot be invoked as the authorities hold, and there can be no question that in a case of this kind a court of equity alone can grant the proper relief.

In *Clark v. Flint*, 22 Pick. 231, 33 Am. Dec. 733, decided in 1839, it is said in the syllabus: "A remedy by action for damages against a person actually insolvent is not a plain, adequate and complete remedy at law, so as to deprive the court of jurisdiction in equity." (22 Am. & Eng. Ency. of Law, 989, 992.)

The case of *Parker v. Garrison*, reported in 61 Ill. 250, we find one of the most interesting and instructive cases to which our attention has been called; it is said: "What had the complainant in the way of any adequate remedy at law? Garrison was insolvent. Any recovery of damages against him would have been worse than bootless, as it would only have entailed upon the complainant an additional loss in the form of a bill of costs."

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We do not deem it necessary to cite additional authorities or to discuss the case further. It is shown by the complaint that plaintiff at all times performed each and all the terms and conditions of the contract up to the time of the death of Orin Thayer. After the defendant was appointed administratrix of his estate plaintiff continued to furnish money to aid her in the fulfillment of the contract. This he continued to do until he had paid a sum of money far in excess of his agreement. Then when the wood is in the river, or ready for delivery, more than six hundred cords short of the contract, plaintiff is informed that unless he release five hundred cords that no additional wood will be delivered. This was at a time when plaintiff had received about two hundred and fifty cords of wood on the contract and had paid out over \$8,000, in money, nearly one-half of which had been paid to the defendant. Under the authorities cited all through this opinion and the facts as disclosed by the complaint, should the plaintiff permit the wood to break and destroy the boom and float down the river, thus being a total loss to plaintiff as well as the estate of Orin Thayer and the defendant, or should equity aid him in securing the wood and protecting the property that he had more than paid for? Whilst we are not in favor of extending aid by injunction, beyond what seems to be its necessities, we are at a loss to know what other remedy plaintiff had in this case. He was compelled to act promptly or lose his money by reason of the failure of defendant to comply with her part of the contract, which she agreed to do in order to secure the money from plaintiff to carry on the work of delivery of the wood. We find no error in the order overruling defendant's demurrer to the complaint. Judgment is affirmed, with costs to respondent.

Sullivan, J., and Ailshie, J., concur.

Argument for Petitioner.

(February 28, 1905.)

IN RE JOHN KNUDTSON.

[79 Pac. 641.]

PRELIMINARY EXAMINATION—HOLDING PRISONER WITHOUT REASONABLE OR PROBABLE CAUSE CANNOT BE INQUIRED INTO ON HABEAS CORPUS AFTER CONVICTION—REVERSIBLE ON APPEAL.

1. Where a prisoner has been convicted in a court of competent criminal jurisdiction, and by such court committed to the state penitentiary, it is too late for the prisoner, on application for discharge on *habeas corpus*, to raise the question that the evidence produced against him at the preliminary examination did not show the commission by him of any offense, and that he was committed without reasonable or probable cause.

2. The supreme court is a court of original jurisdiction on applications for *habeas corpus*, and in the exercise of that jurisdiction cannot review as upon appeal questions which were properly presentable to the trial court upon arraignment or subsequent thereto.

3. Under our system of prosecutions upon information, a prosecuting attorney has no right to file an information against anyone where the depositions taken at the preliminary examination fail to disclose any reasonable or probable cause for believing the defendant guilty of an offense, unless the defendant has waived examination.

(Syllabus by the court.)

APPLICATION for and on behalf of John Knudtson for a writ of *habeas corpus*. Hearing had after notice. Application denied and prisoner remanded.

S. S. Denning, for Petitioner.

It was wrong to have bound the petitioner over without any evidence whatever; this wrong cannot be cured even by a verdict of "guilty." As to this matter, let us examine some of the authorities in the states of Idaho and California. Upon the hearing of the argument of this petition, it was suggested from the bench that perhaps the proper remedy would have been a motion to quash the information, and the case of *State v. Braithwaite* was called to the counsel's attention; since then we

Argument for the State.

have examined that case and some others. In *State v. Braithwaite*, 3 Idaho, 119, 27 Pac. 731, it was there held that a warrant had been issued, but there was nothing before the district court to show that there had been a criminal complaint or that any deposition had been taken in the case, and this court held that on a motion to quash, the defendant might set up those matters in bar of the jurisdiction, and the court held that a party could not be informed against unless he had first been bound over before a justice of the peace, charged by a warrant and held upon sufficient evidence. (*Kallock v. Superior Court*, 56 Cal. 229.) In *State v. Schieler*, 4 Idaho, 120, 37 Pac. 272, the question was indirectly raised as to how far a party could be informed against on the evidence produced before the coroner's jury as that evidence had been used before a grand jury, but the court swept the objection to one side by showing that there had been independent evidence before the grand jury to warrant the finding of the bill. (*State v. McGann*, 8 Idaho, 40, 66 Pac. 823; *State v. Clark*, 4 Idaho, 7, 35 Pac. 710; *State v. Faris*, 5 Idaho, 666, 51 Pac. 772; *Ex parte McConnell*, 83 Cal. 558, 23 Pac. 1119.) In none of all of the cases which have come under our observation has there been an attempt made by a motion to quash the information to raise the question of the sufficiency of the evidence upon which the party has been held as being without reasonable or probable cause, except *Ex parte Starnes*, 82 Cal. 245, 23 Pac. 38; *In re Levy*, 8 Idaho, 53, 66 Pac. 806. We further present to this court the proposition that this, the right to sue out a writ of *habeas corpus* upon the insufficiency of the evidence or the want of probable cause, is a new right created by statute, and a remedy in support of the same; such being the case, the right and the remedy are exclusive, and the statutory remedy must be pursued to the exclusion of all others. (*Reed v. Omaibus R. R. Co.*, 33 Cal. 212.)

J. J. Guheen, Attorney General, and W. E. Stillinger, for the State.

We call the court's attention to the fact that this writ is not to be issued as "of course," and whether or not there exists sufficient cause for its issuance is a matter for the sound legal

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discretion of the court. Accordingly, where no *prima facie* case is made out in the petition, the writ will be denied. The court should, therefore, before issuing the writ, examine into the petition; and if it does not appear that there is sufficient cause for issuing the writ, or if it appears that after the matter is heard the prisoner must be remanded, the court should deny the application. (9 Ency. of Pl. & Pr. 1023.) While there may be some diversity in the books relative to the scope of the inquiry in *habeas corpus* proceedings, we submit that the rule is well settled, regardless of statutory provisions, that where a prisoner is in custody under sentence of conviction, the inquiry on the writ must be limited to the jurisdiction of the court in which the prisoner was convicted, and the validity of the sentence on its face; but no inquiry can be had into the sufficiency of the evidence to support the conviction. (15 Am. & Eng. Ency. of Law, 201, 202; *Ex parte Long*, 114 Cal. 159, 45 Pac. 1057.) This court is precluded from any inquiry into reasonable or probable cause, as provided in subdivision 7 of section 5754 of Penal Code of 1901, for the reason that it appears that he is confined by virtue of a final judgment of a competent court of criminal jurisdiction. (Pen. Code 1901, sec. 5743, subd. 2; *In re McCutcheon*, 10 Mont. 115, 25 Pac. 97.) It is sufficient to authorize holding the accused, if it be shown that probable cause exists to believe that he committed the crime charged, and the sufficiency of the facts from which this may be deduced is for the determination of the magistrate alone. (12 Cyc. 311.)

AILSHIE, J.—The petitioner in this case having been convicted of the crime of arson, and now being held in custody by the warden of the state penitentiary under a commitment from the district court in and for Latah county, now seeks his discharge upon a writ of *habeas corpus*, alleging as grounds therefor that the evidence produced against him at the preliminary examination prior to the filing of an information fails to disclose any crime or public offense committed by him, and that he was held upon such examination without reasonable or probable cause. It appears that an examination of the charge against the defendant was brought on before a justice of the peace in and for Latah county, on the twentieth day of Decem-

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ber, 1904, and that on the following day the examination was closed and the defendant was bound over to the district court by the justice upon the charge of arson. On the same day, December 20th, the petitioner sued out a writ of habeas corpus before the district judge of the second judicial district, and on the twenty-fourth day of the same month the prisoner was produced in court, and the application was heard and considered by the district judge, and the prisoner was thereupon remanded. On the twenty-first day of December, and subsequent to the suing out of the writ, but prior to the hearing thereof, the prosecuting attorney for Latah county filed in the district court his information predicated upon the prior preliminary examination, and charging the defendant with the crime of arson. The case went to trial in the district court on the thirty-first day of December, and on the fourth day of January following, the jury returned a verdict against the defendant of "guilty of arson in the second degree." The petitioner insists that the evidence taken at the preliminary examination failed to show the commission of any crime whatever by him, and failed to connect him in any way with the commission of an offense, and that he was therefore committed without reasonable or probable cause. The warden of the state penitentiary has made a return to the writ heretofore issued, from which it appears that he holds the petitioner by virtue of and under a judgment and commitment in due form and regular upon its face, from the district court of Latah county, and it is contended by counsel for the state that in this proceeding the court cannot go behind the judgment to examine the regularity of the proceedings had against the petitioner. Section 8353, Revised Statutes, prescribes the duty of the court or judge upon such a hearing as follows: "The court or judge, if the time during which such party may be legally detained in custody has not expired, must remand such party, if it appears that he is detained in custody: 2. By virtue of the final judgment or decree of any competent court of criminal jurisdiction, or of any process issued upon such judgment or decree." It appears to us that under the foregoing statutory provisions, we are without authority to examine the evidence taken upon the preliminary examination for the purpose of determining whether or not it discloses any offense as

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having been committed by the petitioner. There is no question in this case but what the district court is a court of competent jurisdiction for the trial of the offense charged, nor is there any question as to the venue; consequently there is no occasion for examining the record for the purpose of ascertaining those facts.

At the time of writing the opinion in *Re McCutcheon*, 25 Pac. 97, the state of Montana appears to have had a statute substantially the same as section 8353 of our Revised Statutes, and in that case the court, passing upon a very similar question to the one under consideration, said: "In a case like the one at bar, wherein the court had plenary jurisdiction to try the charge and enter judgment, we cannot, on *habeas corpus*, review and pass upon the legality or illegality of the proceedings at the trial, because the statute limits and confines our inquiry to the question as to whether the judgment is rendered, and the writ by virtue thereof is issued, by a court of competent criminal jurisdiction."

In 15 American and English Encyclopedia of Law, second edition, 201, the author says: "Where a prisoner in custody under a sentence of conviction seeks to be discharged on *habeas corpus*, it is well settled as a general rule that the inquiry is limited to the question whether the court in which the prisoner was convicted had jurisdiction in the premises, and the validity of the sentence or process on its face; but no inquiry can be had into the sufficiency of the evidence to support the conviction, or into any question which it was the province of the trial court to determine, because it is not the province of the writ to retry issues of fact or to review the rulings of the trial court."

In *Ex parte McConnell*, 83 Cal. 558, 23 Pac. 1119, the court had under consideration an application for a writ of *habeas corpus* where the petitioner alleged that prior to conviction he never had a preliminary examination as required by law. The syllabus to that case is as follows: "A prisoner convicted upon an information of a felony cannot raise the objection in a proceeding upon *habeas corpus* that he was not examined or held to answer by a magistrate prior to the filing of the information.

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Such objection should have been taken before trial, by motion to set aside the information."

In *Ex parte Stearns*, 82 Cal. 245, 23 Pac. 38, an application was made for writ of *habeas corpus* upon the grounds that the petitioner had been held by a committing magistrate after an examination had, without probable cause. The application in that case was made in the supreme court prior to the filing of an information by the public prosecutor, but the case was heard subsequent to the filing of the information, and the court held that notwithstanding an information had been filed in the meanwhile, under the provisions of subdivision 7, section 1487 of the California Penal Code, it became the duty of the court to examine the depositions and determine for themselves whether or not probable cause existed, and after such examination they found in favor of the prisoner's contention and ordered him discharged. Subdivision 7 of section 8354 of our Revised Statutes is identical with subdivision 7, section 1487, of the California Penal Code. By our statute, *supra*, it is provided: "If it appears on the return of the writ that the prisoner is in custody by virtue of process from any court of this state, or judge or officer thereof, such prisoner may be discharged in any of the following cases, subject to the restrictions of the last section: . . . 7. Where a party has been committed on a criminal charge without reasonable or probable cause." In the case at bar, however, the application was not made in this court until after a conviction was had in the lower court.

If no evidence was produced against the petitioner at the preliminary examination, and he was held without probable cause, it was clearly the duty of the court under the foregoing statute to discharge the prisoner on *habeas corpus*.

The same objection is certainly available to a prisoner upon arraignment after the filing of an information by the prosecutor. It is elementary law, under our modern system of prosecution by information, that a prisoner has no right to file an information against anyone where the depositions taken at the preliminary examination (unless examination was waived) fail to disclose any reasonable or probable cause for believing the defendant guilty of an offense. His informa-

Points decided.

tion must charge an offense shown by the depositions, and if they fail to disclose any offense against the prisoner the prosecutor can charge no offense by his information. If a defendant in such case does not avail himself of the benefits of *habeas corpus* prior to his arraignment and trial, then he is certainly entitled to interpose the objection to the information, and of course has the right of appeal for the correction of any error committed by the trial court in passing upon the matter.

This is a court of original jurisdiction in matters of *habeas corpus*, and upon such application it cannot exercise the jurisdiction of an appellate court or for such purpose convert itself into an appellate court for the examination of questions reviewable upon appeal. (*Ex parte Long*, 114 Cal. 159, 45 Pac. 1057.) The method of presenting irregularities in the holding of preliminary examinations, or a total failure thereof, has been in a measure sanctioned by this court in *State v. Braithwaite*, 3 Idaho, 119, 27 Pac. 731; *State v. Clark*, 4 Idaho, 7, 35 Pac. 710; *State v. Faris*, 5 Idaho, 666, 51 Pac. 772; *State v. McGunn*, 8 Idaho, 40, 66 Pac. 823. See, also, *Ex parte McConnell*, 83 Cal. 558, 23 Pac. 1119.

For the foregoing reasons the writ will be quashed and the prisoner remanded to the custody of the warden of the penitentiary.

Stockslager, C. J., and Sullivan, J., concur.

(March 3, 1905.)

IN RE LUTHER SNYDER.

[79 Pac. 819.]

CITY ORDINANCE, WHEN VOID—FARMER MAY SELL BEEF IN THE CITY WITHOUT LICENSE.

1. An ordinance by the terms of which a farmer is prohibited from selling the products of his farm, with the exception of milk, fish and game, without first taking out a license from the city, is in violation of section 8 of an act entitled "An act to repeal

Argument for Respondent.

section 1651 of the Revised Statutes of the state of Idaho and to provide for the licensing of peddlers, hawkers and solicitors, and prescribing penalties for failure to comply with the provisions of this act." (Sess. Laws 1901, p. 56.)

2. Beef from slaughtered animals raised and slaughtered on the farm is the product of the farm, and may be sold within the corporate limits of cities of this state without license.

(Syllabus by the court.)

ORIGINAL proceeding for writ of *habeas corpus*. Petition granted.

The facts are stated in the opinion.

J. C. Johnson, for Petitioner, cites no authorities on the points decided not found in the opinion.

Wyman & Wyman and C. M. Kahn, for Respondent.

Neither the original section 1651 nor the repealing act in any way states that peddlers or hawkers in farm products shall not pay a license, but it simply says in section 8 that "the provisions of this act shall not be construed to apply to . . . peddlers or hawkers in farm products." The act is one simply for state and county licenses and does not purport to be exclusive. To the contrary, section 1636, Revised Statutes, which is a part of the same chapter, providing for licenses, says: "No license issued under this chapter authorizes any person to carry on any business within the limits of any incorporated city or town having power by its charter to impose or levy city or town licenses thereafter, unless such person, in addition to the license provided by this chapter, also procures the license required by the ordinances or orders of such city or town." This would seem to be conclusive of this question. (*Canora v. Williams*, 41 Fla. 509, 27 South. 30; 21 Am. & Eng. Ency. of Law, p. 787.) The legislature has expressly given the authority to the city council to define what a peddler is, and there is no claim made nor can there be any authority shown that the legislature has not the power to authorize the city council to define a peddler. Under the authority given to it by its charter, the city has defined a peddler by ordinance, and it

Argument for Respondent.

includes within its terms the petitioner. That one selling products of farms is defined to be a peddler by this ordinance is very clear. (Revised Ordinances of Boise City, sec. 454, p. 106.) The validity of this ordinance is attacked on the ground that it tends to create a monopoly, and is unreasonable, oppressive and prohibitive. There is no attempt made to create a monopoly. There is no prohibition on the farmer selling his products anywhere and on the same terms and conditions of others engaged in peddling; but there can be no question that it is not in restraint of trade to absolutely prohibit the peddling of garden and farm products, meat, poultry, game, etc., about the streets of the city. (McQuillin on Municipal Corporations, p. 765.) It is very important to note the distinction between the Boise city charter and most of those discussed in the cases cited by petitioner. Those cases like *City of Burlington v. Dankwardt*, 73 Iowa, 170, 34 N. W. 801, *St. Paul v. Laidler*, 2 Minn. 159, 72 Am. Dec. 89, *City v. Traeger*, 25 Minn. 248, 33 Am. Rep. 462, and *City of St. Paul v. Stoltz*, 33 Minn. 223, 22 N. W. 634, cited by petitioner, were under charters that simply gives the city authority "to establish and regulate markets," and it was held that ordinances prohibiting the sale of meat except in shops under that ordinance was void. In those cases the cities had no ordinances requiring peddlers to procure licenses, so that those cases are not in point. Some statutes only allow cities to "license and regulate," and a different rule is here applied, but the charter of Boise city provides that they may "license, tax and regulate," and under such a charter petitioner fails to cite one authority which would hold that the amount fixed by the ordinance in this case is unreasonable, prohibitive or in restraint of trade. The purpose of a statute in empowering cities to pass ordinances in restraint of hawking and peddling is forcibly stated in the cases of *Graffy v. City of Rushville*, 107 Ind. 506, 57 Am. Rep. 128, 8 N. E. 609; *South Bend v. Martin*, 142 Ind. 40, 41 N. E. 315, 29 L. R. A. 531; *Temple v. Sumner*, 51 Miss. 13, 24 Am. Rep. 615; *Hall v. Commonwealth*, 101 Ky. 382, 41 S. W. 2. It would be difficult, if not impossible, to fix any license tax which would fall with per-

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fect equality upon all persons engaged in the same occupation. (See *City of St. Paul v. Colter*, 12 Minn. 48, 90 Am. Dec. 278; *In re Vandine*, 6 Pick. 187, 190, 17 Am. Dec. 351; *Stull v. De Mattos*, 23 Wash. 79, 62 Pac. 451, 51 L. R. A. 892; *City of Chicago v. Bartee*, 100 Ill. 57; *People v. Russell*, 49 Mich. 617, 43 Am. Rep. 478, 14 N. W. 568; *Shelton v. Mobile*, 30 Ala. 540, 68 Am. Dec. 143; *Emert v. State of Missouri*, 156 U. S. 306, 15 Sup. Ct. Rep. 367, 39 L. ed. 432.) The licensing of butchers and restraining of persons selling meat indiscriminately is one that especially commends itself to the law-making power as necessary for the preservation of health, and has not commended itself to the courts for special privileges. (*People v. Russell*, 49 Mich. 620, 43 Am. Rep. 478, 14 N. W. 568; Cooley on Taxation, 2d ed., pp. 301, 777; *Ex parte Haskell*, 112 Cal. 416, 44 Pac. 725, 32 L. R. A. 527; *Rosenbloom v. State*, 64 Neb. 342, 89 N. W. 1053, 57 L. R. A. 922; McQuillin on Municipal Corporations, pp. 634, 635; 21 Am. & Eng. Ency. of Law, p. 790; also p. 807; Cooley on Taxation, 1141; *Ex parte Heylman*, 92 Cal. 492, 28 Pac. 675—rate higher held not oppressive.) There perhaps has been more or less sentimentalism making exemption in favor of farmers in the general laws. Frequently this exemption has been held to be unconstitutional. (*Georgia Packing Co. v. Macon*, 60 Fed. 774; McQuillin on Municipal Corporations, pp. 256-298; *Town of Mandeville v. Baudot*, 49 La. Ann. 236, 21 South. 258.)

STOCKSLAGER, C. J.—This is an original application for a writ of *habeas corpus*. The petitioner was arrested charged with the violation of section 454, Revised Ordinances of the City of Boise. On his trial he was convicted and thereafter fined in the sum of \$15 and costs. The ordinance with which petitioner is charged with violating is as follows: "Peddlers shall be classified and rated as follows: When traveling with more than two animals, first class. When traveling with two animals, second class. When traveling with one animal, third class. When traveling on foot, fourth class. Peddlers of the first class shall pay a license of twenty-five dollars (\$25) per month; of the second class shall pay a monthly license of twenty

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dollars (\$20); of the third class shall pay a monthly license of fifteen dollars (\$15); the peddlers of the fourth class shall pay a monthly license of ten dollars (\$10); that there are excepted from the provisions of this section, persons peddling newspapers, religious tracts, and farmers or gardeners peddling milk, fish or game."

The complaint charged petitioner with peddling his beef in the city of Boise without first procuring a license therefor under said ordinance. Petitioner refused to pay the fine and costs and was committed to the jail of Boise until the fine and costs were paid; that petitioner is still restrained of his liberty under said commitment by said court for refusing to pay said fine and costs. Petitioner first alleges that said ordinance is invalid and void for the reason that the said ordinance is in conflict with article 12, section 2, of the constitution of the state of Idaho.

2. That the said court had no jurisdiction upon which to sustain said proceedings and judgment, for that the said ordinance upon which said judgment and proceedings were based is illegal, unconstitutional and void.

3. That the said ordinance is in conflict with and repugnant to the constitution of the United States.

4. That the defendant is not a peddler or hawker, and that the said ordinance does not apply to the defendant and that the prosecution had under said ordinance is illegal and void and the court had no jurisdiction to assess a penalty thereunder against the defendant herein.

5. That the said ordinance is void, for the reason that it unjustly discriminates between the residents of the same locality and the same county, and against different sections and classes of the same locality.

6. That the said ordinance is void, for that the said tax is not uniform as imposed upon the residents of Boise City and Ada county.

7. That the said ordinance is void, for the reason that the same was established and enacted in favor of a special class, to wit, the butchers of Boise City, Idaho, to drive out the products of the farmers of Ada county, Idaho.

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8. That the amount of the tax for a license as fixed under said ordinance is unreasonable, oppressive, prohibitive, partial and therefore void.

9. That the said ordinance is void, for that it is in restraint of trade and business; that the defendant herein is not a butcher by trade nor carrying on said business, and does not reside in the city of Boise, but is a farmer by trade and occupation and resides near the town of Meridian, Ada county, Idaho, and that all the meat that he sold was of the product of his own farm; that he had no office either upon his farm or in Boise City, or at any place whatsoever wherein he conducts any business as a butcher, or as a hawker or as a peddler.

10. That the said ordinance is illegal and void, for the reason that the city council of Boise City, Idaho, had no power to enact the said ordinance in question; that they acted beyond their power in so enacting said ordinance.

11. That the said ordinance is void because it interferes with the business and property rights of persons and citizens of Ada county, in this locality, and is excessive and prohibitive in the license tax therein provided.

The facts upon which defendant was tried and convicted before the police magistrate are stipulated and are shown to be that defendant in that court, petitioner here, was charged with selling meat within the corporate limits of Boise City, contrary to the ordinance of said city and without first having procured a license as provided by section 454 of the Revised Ordinances of the city; was convicted and fined in the sum of ten dollars and was committed to the jail of said city until such fine and costs are paid. It is further stipulated that petitioner is not a resident of Boise City, nor has he any business occupation therein as a butcher, nor does he conduct the butcher business in the city of Boise, nor upon his farm. That petitioner is a farmer by occupation, residing upon his farm near the town of Meridian; that all the beef sold by defendant was the product of his own farm in Ada county, Idaho; that he sold his beef by the quarter of a slaughtered animal which was slaughtered upon his farm in said county, and was the product of cattle raised upon his said farm. That petitioner did not purchase a license as provided by the ordinance of the city of Boise.

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Counsel for petitioner insists that the ordinance in question is void for the reason that it is in conflict with article 12, section 2 of our constitution, which provides that, "Any incorporated city or town may make and enforce, within its limits, all such local, police, sanitary, and other regulations as are not in conflict with its charter or with the general laws."

It is also urged by counsel for petitioner that the legislature of this state in 1901, enacted a law that is a bar to a prosecution of petitioner under the ordinances of the city for selling within the corporate limits of the city the products of his farm, for the reason that by section 8 of the act found on page 156 of that session, he is exempt. Section 8 provides: "Applicable when. The provisions of this act shall not be construed to apply to runners traveling for wholesale houses and taking orders from merchants only, nor to peddlers or hawkers in farm products."

The act of which the above-quoted section is a part repeals section 1651, Revised Statutes, which was as follows: "Every traveling merchant, hawker or peddler, who carries a pack and vends goods, wares, or merchandise of any kind other than the manufactures or productions of this territory, must pay for a license ten dollars per month; and every such traveling merchant, hawker or peddler, who uses a wagon, boat or other water-craft, or one or more animals, for the purpose of vending such goods, wares, or merchandise of any kind, must pay for a license twenty dollars per month."

Subdivision 48 of the amended charter of Boise City provides: "The power and authority given to the council by subdivision 37 of this section can only be enforced or exercised by ordinance, unless otherwise expressly provided, and a majority of the council may pass any ordinance or resolution not repugnant to the constitution and laws of the United States or of the state of Idaho, necessary or convenient for carrying into effect any power or authority granted by this act."

As we view it the important questions to determine are: 1. Is the ordinance complained of in violation of the constitution and laws of the state? 2. Has the city under its charter power to enact an ordinance prohibiting a farmer from selling meat

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raised and slaughtered on his farm, within the corporate limits of the city? 3. Are cattle raised, fattened and slaughtered on the farm products of the farm? 4. Is an ordinance that prohibits the sale of any of the products of the farm, excepting milk, fish and game, without first procuring a license, class legislation? If either of these questions is to be decided in favor of the petitioner, then his petition must be granted.

On the first question our attention is called to a case decided by this court entitled *In re Ridenbaugh*, 5 Idaho, 371, 49 Pac. 12. This was also a *habeas corpus* proceeding. The petitioner was convicted of the crime of conducting the gambling game of "faro" in Boise City, Idaho, under the provisions of an act entitled: "An act to prohibit gambling, and to provide for the punishment thereof, and for other purposes," approved March 8, 1897 (Sess. Laws 1897, p. 53). On the trial the petitioner relied on a license procured from the corporate authorities of Boise City. After the state had proved that the defendant had been conducting said gambling game, the defendant offered to introduce in evidence license No. 225 of said city, which is as follows: "No. 225, Boise City. License granted May 8, 1897, State of Idaho. Expires August 7, 1897. This license is granted to Thos. Constance for faro, in Boise City."

It is shown that the court rejected any and all evidence offered by petitioner showing that the city had attempted to license gambling in the city on the ground that the ordinance was in conflict with the constitution and laws of the state. Mr. Justice Sullivan, who wrote the opinion in the above case, after stating the facts, says: "The act amending sections 3, 5 and 11 of the charter of Boise City, approved March 12, 1897, provides that the city council may pass ordinances not repugnant to the constitution and laws of the United States, or the laws of this state, necessary or convenient for carrying the powers and authority granted into effect. (See Sess. Laws 1897, p. 85.) Thus it is shown by the original charter of Boise City, also by section 2 of article 12 of the constitution, and the act amending the charter of Boise City, that it was not the intention of the legislature or the framers of the constitution to empower the council of incorporated cities and towns to pass ordinances

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in conflict with the general laws of the state. The cardinal rule in construing constitutional, as well as statutory, provisions, is to discover and enforce the intention of those who made them. Said provision of the constitution, as well as the provisions of the original charter of Boise City, and as amended, are too plain to require construction. It was not the intention to permit or authorize the councils of incorporated cities to legalize by ordinance acts prohibited as criminal by the general criminal laws of the state, or to enforce ordinances in conflict with the general law. In case of conflict the ordinance must give way. The ordinances authorized by the charter of Boise City must be in harmony with the general laws of the state."

In *Ex parte Sing Lee*, 96 Cal. 354, 31 Am. St. Rep. 218, 31 Pac. 245, 24 L. R. A. 195, the supreme court of California discusses an ordinance of the town of Chico in that state which provided that "No person can carry on a laundry business in such town except in certain blocks therein named, without obtaining a written permit from the board of trustees. Section 2 provides that the board of trustees shall grant no permit unless the person applying shall have obtained the written consent of a majority of the real property owners within the block wherein it is proposed to carry on such laundry business, and also of the four blocks immediately surrounding such block. Held, that such provisions were not police regulations within the constitution, article 11, section 11, providing that any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws, and were unconstitutional."

It is next urged by counsel for petitioner that even though the ordinance is valid, a prosecution cannot be sustained under it as the charter of Boise City, subdivision 2, provides: "To license, tax and regulate brokers, auctioneers, taverns, hawkers, peddlers, pawnbrokers, etc." This power, which was given to the city under the act of 1901, is still the law governing said city. The city is given the power to regulate hawkers and peddlers, but as to who in law is a hawker or peddler is not alone for the city to define. In our view of the case, this raises

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a very serious question for the city to overcome. It cannot be seriously contended that the city by ordinance can arbitrarily preclude residents and citizens of the state or city from engaging in lawful business; neither do we think the city has the power to prevent farmers from selling the products of their farms to the citizens of Boise within the corporate limits, by an ordinance that attempts to class them as hawkers or peddlers. The ordinance in controversy attempts to prevent the sale of any article offered on the streets or within the city by a farmer, with the exception of game, fish and milk. The constitution says: "Any incorporated city or town may make and enforce within its limits . . . such regulations as are not in conflict with its charter or with the general laws." The general law within the meaning of the above constitutional provision, when it provides that it is not applicable to peddlers or hawkers in farm products, excludes them from paying a license if the article complained of and shown by the agreed statement of facts to have been beef was the product of the farm within the meaning of the statute.

Again, the question arises: Is a farmer engaged in that business, with no other trade or occupation, because he slaughters his cattle, hogs or sheep on his farm and retails them in the city, a hawker or peddler within the ordinary meaning of those words? Webster says a hawker is "one who hawks; a peddler." "To sell goods by outcry in the streets." He says: "A peddler is one who sells by traveling—one who peddles, a traveling hawker; one who carries about small commodities on his back or a cart or wagon, and sells them."

In volume 15, American and English Encyclopedia of Law, second edition, page 294, in discussing hawkers and peddlers as applicable to farmers and gardeners, the author says: "A farmer or gardener, although he may vend his commodities at retail from door to door and from town to town, is not regarded as a hawker or peddler so long as he confines his sales to the growth or production of his own farm or garden. The sale of farm or garden produce in such case is considered merely an incident in the principal business of farming and gardening."

In *Gunn v. Mayor and Council of Macon*, 84 Ga. 365, 10 S.

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E. 972, Gunn was charged with running a wagon in the city of Macon without first obtaining a license to do so. Mr. Justice Simmons, speaking for the court, says: "The tax sought to be collected from Gunn was a business and not a property tax. Under the charter of the city of Macon, the mayor and council have a right to impose a business tax upon each and every person doing business in said city, and they have a right to impose this business tax in the way of requiring owners of wagons to take out a license therefor when said wagons are engaged in carrying on the owner's business in said city. But under the facts of this case, Gunn was not carrying on any business in the city. He simply farmed near thereto, and clearing up his land for agricultural purposes, he saved the wood, hauled it to the city and sold it. He was not carrying on the wood business as a business, but simply sold the wood from his land as he cleared the same for the purpose of cultivation. He did not live in the city but in the country. Nor did he have any office or woodyard in the city or elsewhere for the purpose of carrying on the business of dealing in wood.

"We think the city authorities could with equal propriety tax every wagon belonging to a farmer who brought his cotton or his corn to the city for the purpose of sale. It seems to us that the bringing of cotton, corn or other agricultural products to the city for sale by farmers would be engaging in business in the city just as much as for Gunn to bring in his surplus wood and sell it in the city."

Whilst the facts in the above case have a definite and distinct bearing on the question under discussion, yet there is much more reason for holding that the ordinance in the case at bar cannot be enforced than there was in the Macon case. It seems that the city of Macon had by ordinance protected people engaged in trade in that city by requiring anyone who desired to engage in teaming, and evidently any and all classes of business, to procure a license from the city, thus protecting those who were willing to pay for the privilege of carrying on business in that city.

It does not appear that the city of Boise by ordinance requires everyone engaged in trade in the city to procure a license, hence

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it cannot be urged that the ordinance was enacted to protect those engaged in trade within the corporate limits and had paid a license for such privilege. Neither does it appear that the city has established a market-house or market-houses, or provided for an inspection of all meats sold within the city. If the ordinance provided for either a market-house or inspection of all kinds of meat or other products sold in the city, then we could readily see the necessity for an ordinance of the character of the one in dispute; but in the absence of any requirement of the citizens of Boise engaged in the butcher business, or the sale of meat, where they have an established place of business, to procure a license, is certainly class legislation—prohibits the farmer from disposing of the products of his farm, except milk, fish and game, and can certainly have but one effect, and that is practically prohibiting the farmer from disposing of the products of his farm, and the city receives no revenue or benefit from the effect of such ordinance.

The case of *Gunn v. Mayor etc., supra*, discusses a case reported in 64 Ga. 128, 37 Am. Rep. 60. The title is *Davis v. Mayor and Council of Macon*. The court says: "In that case Davis was a middleman. He had his butcher stalls outside of the city, it is true, but he bought beef cattle from farmers and others, butchered them outside of the city, ran his wagons into the city, and delivered his beef to regular customers. While his slaughter-pen was outside of the city, all his business save the slaughtering was done in the city, and this court properly held that he carried on a business in the city and was therefore liable to the license tax on his vehicles."

In *Borough of Sharon v. Hawthorne*, 123 Pa. St. 106, 16 Atl. 835, it is said in the syllabus: "The right to enact and enforce a borough ordinance prohibiting the hawking and peddling within the borough, of garden, farm or dairy products, not the products of one's own garden or farm, is authorized by section 2, paragraph 11, of the borough law of April 3, 1851, P. L. 320." In this case it was stipulated that Hawthorne purchased butter, eggs, and other farm products and sold the same from house to house in said borough.

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It is urged by counsel for petitioner that the city of Boise could not, under the guise of a police regulation, pass an ordinance excluding the farmer from the sale of the products of his farm within the corporate limits of the city; if it did so, such an ordinance would be in restraint of trade and therefore void. In support of this contention he cites *City of Bloomington v. Wahl*, 46 Ill. 489; the syllabus says: "Under the authority conferred upon municipal corporations to erect, establish and regulate markets and market places, whenever the power is exercised, it must be reasonable and uniform in its operation, and be calculated to promote the general welfare of the inhabitants, and must not create monopolies, nor restrain trade."

"2. The charter of the city of Bloomington empowered the common council 'to erect market-houses, establish markets and market places, and provide for the government and regulation thereof,' under which an ordinance was passed, designating two certain lots, and the ground floor of the building thereon, as a market place, and prohibited any and all persons, at all hours of the day from keeping a private market, outside of the designated market place for the sale of fresh meats in any quantity, excepting a few certain kinds, under a penalty of \$20.00 for each offense. Held, that the ordinance was unreasonable; that it was in restraint of trade, and tended to create a monopoly." Mr. Justice Walker in the opinion says: "A few plain principles, which are firmly established, and fully recognized by our courts, lie at the foundation of the exercise of this power. The ordinance must be reasonable, uniform in application throughout the limits in which it has operation; it must not be in restraint of trade; it must not create oppressive monopolies, but must be calculated to advance the general welfare of the inhabitants of the municipality." Again it is said: "If all fresh meats may be thus controlled in their sale, all kinds of meat, breadstuffs, vegetables and fruits may be brought under the same restrictions. If this may be done, the business in this department would fall into the hands of the few, and all competition would be destroyed, and the people oppressed. We cannot see that this ordinance is reasonable."

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The ordinance under consideration by the Illinois court was much more reasonable and liberal in its terms than the case under consideration by us. The Bloomington ordinance had the following provision: "This section shall not prevent any person from selling, anywhere, at any time, fresh venison, poultry, fish or wild game, when not otherwise prohibited, nor shall it be construed to prevent any farmer or producer from selling his meat anywhere in the city at any time, in any quantities not less than one quarter; nor shall it be construed to prevent any trader from selling, anywhere in the city, at any time, dried or smoked beef, bacon, shoulders, hams or sides."

We have read with much interest the case of *Chaddock v. Day, Justice of the Peace*, 75 Mich. 527, 13 Am. St. Rep. 468, 42 N. W. 977, 4 L. R. A. 809. The opinion is by Mr. Justice Morse, concurred in by all his associates, with the exception of Sherwood, who did not sit. The trustees of the village Allegan adopted a by-law as follows: "It shall not be lawful for any person to sell or offer for sale, on any street in the village of Allegan, any fresh meat of any animal, in pieces or quantities less than one-quarter of any such animal, without first paying into the village treasury the sum of ten dollars in advance for each month, and obtaining from the clerk a permit for such sale." The charter granting powers to the trustees of the village provides that "The board of trustees shall have full power within said village to license and regulate theaters, shows, traveling concerts, auctioneers or auction sales, gift enterprises, *hawkers, hucksters, peddlers*, and pawnbrokers, or prohibit them from soliciting patronage of the community within the limits of said village; and to require the payment of reasonable license fees." The court says: "We do not think this by-law can be sustained as a regulation of hawkers or peddlers, as it is evident it was not so intended by its framers. Indeed, it appears to be open to the charge of the respondent that it was passed in the interest of the persons in said village selling fresh meat in shops, and in restraint of trade." It is further said: "It is quite common in these latter days for certain classes of citizens—those engaged in this or that business—to appeal to the government—national, state or municipal—to aid them by legis-

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lation against another class of citizens engaged in the same business, but in some other way. This class legislation, when indulged in, seldom benefits the general public, but nearly always aids the few for whose benefit it is enacted, not only at the expense of the few against whom it is ostensibly directed, but also at the expense and to the detriment of the many, for whose benefit all legislation should be, in a republican form of government, framed and devised. This kind of legislation should receive no encouragement at the hands of the courts, and be only upheld when it is strictly within the legitimate power of Congress, or the state or municipal legislatures."

"The business engaged in by Schermerhorn is an innocent and useful one, and sanctioned by the general laws of this state; and, if it be conceded that the village authorities, under the charter, have a right to exact a license fee as a compensation for the expense of the supervision of the trade, yet the fee proposed to be exacted by by-law No. 16, to wit, \$10 per month, is excessive and unreasonable, and therefore void." The writer cites a number of authorities in support of the opinion. If it was true in 1889, when this opinion was written that there was a tendency to concentrate business in the hands of a few to the detriment of the many, there has certainly been no relaxation of that spirit. If it was true that this kind of legislation should receive no encouragement at the hands of the courts and only be upheld when it is strictly within the legitimate power of Congress, or the state, or municipal legislatures, then there is much more reason for such action by the courts now. In support of his contention that the ordinance is void, counsel for petitioner cites *Chaddock v. Day, supra*; *Town of State Center v. Barenstein*, 66 Iowa, 249, 23 N. W. 652; 15 Am. & Eng. Ency. of Law, 299, sec. 4.

It is next insisted that the city council of Boise, under the existing charter, has power to establish market-houses and to regulate the location and management of market-houses, slaughter-houses, hide-houses and prohibit the sale of unhealthful, unwholesome food under the provisions of subdivision 13, page 120, Session Laws of 1901, yet he urges that no such ordinance has been enacted and the court cannot prohibit the sale of products

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of the farm. In support of this contention he cites section 386, 1 Dillon on Municipal Corporations, fourth edition; *City of St. Paul v. Joseph Laidler*, 2 Minn. 159, 72 Am. Dec. 89; *City of St. Paul v. Traeger*, 25 Minn. 248, 33 Am. Rep. 462; *City of Burlington v. Dankwart*, 73 Iowa, 170, 34 N. W. 801. The syllabus in this case says: "Power to prohibit peddling meat, section 456 of the code conferring on cities and towns the power to establish and regulate markets, does not confer the power to prohibit by ordinance the peddling of meat on the streets; not at least until the city or town has established a meat market; and not then unless it be a regulation of the market." (*Burr v. Atlanta*, 64 Ga. 225; *Davis v. City of Macon*, 64 Ga. 132, 37 Am. Rep. 60; *Harwood v. City of Wilmington*, 5 Houst. (Del.) 123; *Commonwealth v. Gardner*, 133 Pa. St. 284, 19 Am. St. Rep. 645, 19 Atl. 550, 7 L. R. A. 666; *Shuman v. City of Ft. Wayne*, 127 Ind. 109, 26 N. E. 560, 11 L. R. A. 378.)

That the ordinance is void, for the reason that the same was enacted in favor of a special class, to wit, the butchers of Boise city, to drive out the farmers of Ada county, Idaho, and infringe upon the property rights of the citizens of the same locality, counsel for petitioner cites 15 Am. & Eng. Ency. of Law, 2d ed., 298, subd. f. The author says: "Laws in restraint of hawking and peddling enacted to benefit the business or conserve the interests of resident and established merchants or other persons immediately concerned have usually been declared invalid and condemned as unfairly discriminating class legislation. But such laws have sometimes obtained judicial sanction." (*Gunn v. Mayor and Council of Macon*, 84 Ga. 365, 10 S. E. 972; *Chaddock v. Day*, 75 Mich. 527, 13 Am. St. Rep. 468, 42 N. W. 977; *Burlington v. Dankwart*, 73 Iowa, 170, 34 N. W. 801; *City of St. Paul v. Stoltz*, 33 Minn. 233, 22 N. W. 634; 22 Am. & Eng. Ency. of Law, 2d ed., 939; *Ex parte Sing Lee*, 96 Cal. 354, 31 Am. St. Rep. 218, 31 Pac. 245, 24 L. R. A. 195.)

It is next contended that where parties are exempted by the general law or the constitution of the state, an ordinance cannot be enacted requiring the payment of a license. (*Roy v. Shuff*, 51 La. Ann. 86, 24 South. 788.) The syllabus says: "The

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farmer who sells his crop in a small wagon (retailing it) is not a peddler and he is not liable under a license law, requiring peddlers to pay a license." (Dillon on Municipal Corporations, sec. 320.)

We have followed the exhaustive brief of counsel for defendant, which has evidently been prepared with much labor and care, but an inspection of the authorities cited does not convince us that the city has the power under the provisions of the state constitution and session laws, both cited, *supra*, to enact and maintain the provision of the ordinance which practically prohibits the farmer from marketing the surplus beef produced on his farm. It must be conceded that if this ordinance can be enforced in its present form, the effect of it is to prohibit the farmer from disposing of his cattle, the product of his farm, in any way except as dictated by the ordinance which in effect says, you must sell your cattle to the butchers of the city, or that product of your farm cannot be marketed in this city. It is immaterial what the intent of the ordinance is, or was, it is its effect that we must examine. If it is shown that the effect is a violation of the constitutional or statutory rights of the citizen, then the ordinance must give way to the higher power. We are fully satisfied that it was never the intention of the legislature to grant a charter to the city of Boise, or any other city of the state, by which they could, by ordinance, prohibit the farmer from engaging in a lawful business such as selling the product of his farm within the limits of the city. If it were shown that the ordinance was intended to protect the citizens from buying diseased meat, unwholesome vegetables, or other products, there might be some reason for its enactment. In our view of the case the petitioner should be restored to his liberty, and it is so ordered. The clerk of this court will serve a certified copy of the order upon the chief of police of Boise City, which will be his authority to release the petitioner from custody.

Sullivan, J., concurs.

Ailshie, J., not sitting at the first hearing, expresses no opinion.

Points decided.

(March 8, 1905.)

STATE v. SEYMOUR.

[79 Pac. 825.]

SUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT—EVIDENCE CONSISTENT WITH INNOCENCE—ADMISSION OF EXEMPLARS FOR COMPARISON OF HANDWRITING.

1. Where S. was arrested on a charge of the larceny of a horse, and at the time of his arrest the animal was found in his possession, and the defendant upon his trial showed that he took the horse up in pursuance of an order from one K., who, he supposed, had a right to the possession of the animal, and that he (S.) had never claimed the animal as his own, but had at all times disclaimed ownership and represented that the animal belonged to K., and that he had kept and used the animal in an open and notorious manner, and there is no conflict in any of the material facts proven, the defendant is entitled to his acquittal and a verdict against him should be set aside and a new trial granted.

2. Where all the evidence in the case is consistent with defendant's innocence, and all the circumstances shown in the case are explained on that theory and appear reasonable, the defendant should be acquitted.

3. The admission in evidence of papers irrelevant to the record for the sole purpose of creating a standard of comparison of handwriting should not be allowed except in cases where the papers are conceded to be genuine, or are such as the opposing party is estopped to deny or fall within some equally well recognized exception.

(Syllabus by the court.)

APPEAL from District Court in and for Bingham County. Honorable James M. Stevens, Judge.

The defendant was convicted of the crime of grand larceny, and from the judgment and order denying his motion for a new trial appealed. Reversed.

The facts are fully stated in the opinion.

Hawley, Puckett & Hawley and J. D. Millsaps, for Appellant.

Argument for Appellant.

We look in vain for any evidence which would show the act or knowledge of a criminal in the taking and keeping of the horse in question by the defendant. In the absence of any such evidence, we are bound to accept his explanation of his possession, corroborated as it is by the evidence of Kimball and Birch. This case is parallel in every material respect with the case of *State v. Seymour*, 7 Idaho, 257, 61 Pac. 1033; *State v. Marquardsen*, 7 Idaho, 352, 62 Pac. 1034. The possession of stolen property, unexplained, is evidence of guilt; but where a reasonable explanation is given, and there is no conflict of evidence in regard thereto, and the witness is not impeached, the jury cannot arbitrarily ignore such evidence before a legal conviction can be had. The state must have established the accused person's guilt of the crime charged by legal evidence and beyond a reasonable doubt, and until that is done the presumption of innocence is an absolute shield to defendant. Upon what the jury bases its verdict of guilty we cannot conceive, unless it was prejudice against the defendant. There is absolutely no evidence to sustain the verdict, and it must be presumed to have been rendered under the influence of passion and prejudice, and should be set aside. (*State v. Nesbit*, 4 Idaho, 548, 43 Pac. 66; *State v. Crump*, 5 Idaho, 166, 47 Pac. 814; *State v. Mason*, 4 Idaho, 543, 43 Pac. 63; *People v. Swinford*, 57 Cal. 86; *People v. Noregea* 48 Cal. 123; 3 Greenleaf on Evidence, sec. 31; *People v. Chambers*, 18 Cal. 383.) In many of the states the question as to whether or not a party can introduce a signature or handwriting for the sole purpose of having it compared with the handwriting in question in the cause is controlled by statute; but we think we can safely say that in all states where there is no special statute governing the matter the common-law rule prevails, and such signature or handwriting cannot be introduced as exemplars for the purpose of comparison. (*Stokes v. United States*, 157 U. S. 187, 15 Sup. Ct. Rep. 617, 39 L. ed. 667; *Hickory v. United States*, 151 U. S. 303, 14 Sup. Ct. Rep. 334, 38 L. ed. 170; *Moore v. United States*, 91 U. S. 270, 23 L. ed. 346; *Rogers v. Ritter*, 79 U. S. 317, 20 L. ed. 417; *Williams v. Conger*, 125 U. S. 414, 8 Sup. Ct. Rep. 933, 31 L. ed. 787; *United States v. McMillan*, 29 Fed.

Argument for the State.

247; *Randolph v. Loughlin*, 48 N. Y. 459; *Miles v. Loomis*, 75 N. Y. 294, 31 Am. Rep. 470; *People v. Parker*, 67 Mich. 222, 11 Am. St. Rep. 578, 34 N. W. 720; *Vinton v. Peck*, 14 Mich. 293; *Van Sickles v. People*, 29 Mich. 61; *State v. Miller*, 47 Wis. 530, 3 N. W. 33; *Pierce v. Northey*, 14 Wis. 9; *Hazelton v. Union Bank*, 32 Wis. 34; *State v. Thompson*, 132 Mo. 301, 34 S. W. 38; *Bowen v. Jones*, 13 Ind. App. 193, 41 N. E. 400; *Hazzard v. Vickery*, 78 Ind. 64; *Shorb v. Kinzie*, 100 Ind. 429; *Burdick v. Hunt*, 43 Ind. 381; *Himrod v. Gilman*, 147 Ill. 293, 35 N. E. 375; *Jumpertz v. People*, 21 Ill. 408; *Massey v. Farmers' Nat. Bank*, 104 Ill. 327; *Hanley v. Gandy*, 28 Tex. 211, 91 Am. Dec. 315; *Hammond v. Wolfe*, 78 Iowa, 227, 42 N. W. 779; *State v. Clinton*, 67 Mo. 380, 29 Am. Rep. 506; Greenleaf on Evidence, sec. 581; 1 Roscoe's Criminal Evidence, sec. 5; *Clay v. Alderson*, 10 W. Va. 49; *West v. State*, 22 N. J. L. 212; *Doe ex dem Henderson v. Hackney*, 16 Ga. 521; *State v. Givens*, 5 Ala. 747; *Kirksey v. Kirksey*, 41 Ala. 640; *Hawkins v. Grimes*, 13 B. Mon. 257; *Nüller v. Johnson*, 27 Md. 6; *Tome v. Parkersburg etc. Ry. Co.*, 39 Md. 36, 17 Am. Rep. 540; *Kenney v. Flynn*, 2 R. I. 319.)

John A. Bagley, Attorney General, D. Worth Clark and O. P. Soule, for the State.

Can writings otherwise not admissible by reason of their being irrelevant to the issues in a cause be introduced in evidence for purposes of comparison? This is the question involved in the consideration of the sixth, seventh and eighth errors relied upon, and is one of the important, probably the most important, questions raised by this appeal, and a matter upon which this court has never been called upon to pass. Different courts have made different rulings upon this question, some permitting comparison by the jury or by experts of the writing already in the case and pertinent to the other issues involved, while in other cases such comparisons have not been permitted at all; while other courts of equal standing have taken the broad ground that writings either admitted to be genuine, or proved to be may be admitted as evidence for the sole purpose of comparison with the disputed writing. (See Code Civ. Proc.,

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sec. 1870, subd. 9; Greenleaf on Evidence, p. 727, sec. 581; *Calkins v. State*, 14 Ohio St. 222; *Baker v. Haines*, 6 Whart. (Pa. St.) 284, 36 Am. Dec. 224; *Moody v. Rowell*, 17 Pick. 490, 28 Am. Dec. 317; *Depue v. Place*, 7 Pa. St. 430; *Travis v. Brown*, 43 Pa. St. 16, 82 Am. Dec. 540.) The evils that may be suggested as likely to arise from the selection of particular writings for the purposes of comparison may be left, as all unfair or misleading evidence must be, to be corrected by other evidence and by the intelligent judgment of the court or jury. In our opinion, such evidence is conducive to the intelligent ascertaining of the truth, and the receiving of it in this case was not error. (*Tyler v. Todd*, 38 Conn. 218; *State v. Hastings*, 53 N. H. 452; *Adam v. Field*, 21 Vt. 526; *State v. Ward*, 39 Vt. 225; *Farmers' Bank v. Whitehill*, 10 Serg. & R. 110; *Travis v. Brown*, 43 Pa. St. 9, 82 Am. Dec. 540; *Chance v. Indianapolis & W. G. R. Co.*, 32 Ind. 472; *Macomber v. Scott*, 10 Kan. 335; *Wilson v. Beauchamp*, 50 Miss. 24; *Benedict v. Flanigan*, 18 S. C. 506, 44 Am. Dec. 583; *Roman v. Plunket*, 2 McCord, 518; *Bennett v. Mathewes*, 5 S. C. 478; *McCorkle v. Binns*, 5 Binn. 340, 6 Am. Dec. 420; *Baker v. Haines*, 6 Whart. 284, 36 Am. Dec. 224; *Vickroy v. Skilley*, 14 Serg. & R. 372; *Callan v. Gaylord*, 3 Watts, 321; *Lodge v. Phipper*, 11 Serg. & R. 333; *Farmers' Bank v. Whitehill*, 10 Serg. & R. 110; *Bank of Pennsylvania v. Jacobs*, 1 Penr. & W. 161; *Depue v. Place*, 7 Pa. St. 428; *Homer v. Wallis*, 11 Mass. 309, 6 Am. Dec. 169; *Richardson v. Newcomb*, 21 Pick. 317; *Commonwealth v. Eastman*, 1 Cush. 218, 48 Am. Dec. 596; *Jewett v. Draper*, 6 Allen, 435; *McKeone v. Barnes*, 108 Mass. 344; *Commonwealth v. Coe*, 115 Mass. 504; *Costelo v. Crowell*, 139 Mass. 590, 2 N. E. 698; *Lyon v. Lyman*, 9 Conn. 55; *Ort v. Fowler*, 31 Kan. 478, 47 Am. Rep. 501, 2 Pac. 580; *Holmberg v. Johnson*, 45 Kan. 197, 25 Pac. 575; *Gilmore v. Swisher*, 59 Kan. 172, 52 Pac. 426; *Wilson v. Beauchamp*, 50 Miss. 24; *Garvin v. Statd*, 52 Miss. 207; *Calkins v. State*, 14 Ohio St. 222; *Koons v. State*, 36 Ohio St. 195; *Tucker v. Kellogg*, 8 Utah, 11, 28 Pac. 870; *Moore v. Palmer*, 14 Wash. 134, 44 Pac. 142; *Hanriott v. Sherwood*, 82 Va. 1; *Tunstall v. Cobb*, 109 N. C. 316, 14 S. E. 28; *State v. Noe*, 119 N. C. 849, 25 S. E. 812.) The rule in force in some of the states, and

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upheld by their courts, apparently for no other reason than that two hundred years ago the English courts, surrounded by entirely different conditions from those now prevailing in all civilized countries, had so decided, cannot be successfully maintained upon any theory which takes into consideration either ordinary justice or common sense. The statute of 1854 was forced upon parliament by reason of the English people having reached a point of civilization and enlightenment that precluded their longer being bounded in this regard by the narrow and unjust rulings in this regard of many of their higher courts. The new era inaugurated in the judicial procedure of the nation was hailed with delight by the highest judicial officers, as will be plainly observed by a reading of the various decisions interpreting the new statute rendered shortly after its passage; not only was the change welcomed by the courts and the people, but the textbook writers as well loudly acclaimed the benefits and justice of the change. The technical rule of the common law, which was certainly not based on common sense, and which was directly opposed to the practice of our ecclesiastical courts, of our courts in India, of the French court, and of the courts of many of the most enlightened states of America was, happily for the administration of justice, abrogated by the legislature in the year just named, so far at least as related to trials at *nisi prius*. (Cited in *Tome v. Parkersburg Ry. Co.*, 39 Md. 36, 17 Am. Rep. 561; 1 Wharton on Evidence, 717, and note; 1 Best on Evidence, 459; 7 Starkie on Evidence, 7th Am. ed., 716.)

AILSHIE, J.—The defendant in this case was informed against by the prosecuting attorney in and for Fremont county, and charged with the offense of grand larceny, committed by the defendant stealing one horse. A change of venue was granted to the defendant and the trial was had in Bingham county at the February, 1904, term of the district court therein, and the defendant was convicted and sentenced to serve a term of five years in the state penitentiary. He moved for a new trial and the motion was denied, and he thereupon appealed from the judgment and the order denying his motion for a new trial.

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The principal contention urged by appellant in this court is that the evidence was insufficient to justify the verdict of the jury, and that there was no evidence to warrant the same. We have carefully examined all the evidence contained in the transcript and shall recite the material facts testified to by each witness in the case.

The prosecuting witness, George E. Little, was called and examined on the part of the state, and testified that he was the owner of the horse in question; that he had owned him for several years, and had never sold him or otherwise disposed of him and never authorized anyone to take him, and that he was running on the range near his place of residence in the month of June, 1903.

Samuel Harrop was next called and testified that he was sheriff of Fremont county at the time of defendant's arrest, and as such sheriff arrested defendant on the charge of larceny of this animal; that the arrest was made by him at St. Anthony on the fifteenth or sixteenth day of July, 1903; that he took the horse from the possession of the defendant at that time. He also testified that he had previously seen the defendant riding the horse about the city of St. Anthony, and especially on the fourth day of July, 1903, when there was a large number of people in St. Anthony, he saw the defendant riding the horse about the city and over the grounds where the celebration was being held; that he talked with the defendant on that day about the horse being a nice little horse and discussed the brand with him; said the defendant told him the horse had the three bar brand on him, and says he might have talked some with the defendant about buying the horse; that he was wanting to buy a horse at that time. The sheriff also testified that at the time he arrested the defendant and took the horse that defendant told him that a fellow had written him and asked him to take up a brown horse for him and he had done so, and this was the horse he had taken up.

Ferry Little, a son of the prosecuting witness, testified that he was acquainted with the horse taken from the defendant; that he belonged to his father, George Little, and that the horse was on the range in the early part of June. Further

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testifying, he said: "I saw him [the defendant] about the 13th of July, 1903, at St. Anthony, and I asked him if he had seen a little brown horse branded three bars on the left shoulder, during his rides, and he said no, he hadn't noticed him, and described some other horses that the horse was running with, and he said he had seen those and had them in a corral and turned them out, I believe, with the exception of one brown horse; this horse I speak of was a brown horse; had one ear lopped. I believe Mr. Seymour spoke of keeping this horse in the barn and fixing his ear. He said if he should see the horse I was inquiring about he would either send the horse to me or let me know about it. I told him of the three bar brand on the horse." The witness further testified that the three bar brand was a plain brand and could readily be seen, and that that brand was on this particular horse. That after the arrest of the defendant, the witness went to the county stables in St. Anthony and got the horse, and found his foretop roached and his tail trimmed, and that he had two shoes on his front feet; that he had no shoes on him when he was turned out on the range. On cross-examination, the witness said: "I didn't mention the lazy JH brand on the horse; I didn't know the brand was on the horse at that time; the first time I noticed it was when I saw the horse in the county stable. Have known the horse four or five years." Witness further testified that the country was open and unfenced for fifteen or twenty miles around the place where his father lived, and that the horse could have gotten out in almost any direction.

Ed. S. Little testified that he saw the defendant in St. Anthony after he was arrested; saw him at the county barn in St. Anthony; he called me down and said he wanted to have a talk with me; said he would like to fix this matter up and didn't want any trouble over it, and I said the horse didn't belong to me, it belonged to my father, and he would have to fix it up with him, and he said Ferry had inquired for the horse, and it looked like he had told Ferry a damned lie about the horse because he didn't notice the brand on him, the three bars on the shoulder, that is Seymour didn't notice the brand." On cross-examination the witness said this conversation took place im-

mediately after the defendant's arrest. On redirect examination the witness said: "I am referring to the little brown horse, branded three bars on the left shoulder and a very dim, lazy JH on the left thigh, it being the horse in question in this case."

The foregoing constitutes all the evidence on the part of the state, with the possible exception of some minor and immaterial matters. After the state rested, the defendant, Emery Seymour, went on the stand and testified that he was acquainted with the horse in question and that the horse was branded JH on the left thigh and three bars on the left shoulder, and that he had known him for six or seven years; that his brother owned the horse when he first knew him and traded him to Arch. Kimball. Continuing he says: "I had the horse in my possession about the 15th or 16th of July, 1903; I received an order for the horse from Bob Birch to get him at the Seymour ranch, three miles north of Driggs, Teton Basin; Birch was riding for me at the time, and on that particular day he was herding horses that he had gathered." The witness then testified that after receiving the order he had started to St. Anthony with some horses, and after crossing the Teton river, he came across this particular horse for which he had received the order, and that he threw him in the bunch and took him on to St. Anthony; that he found him about three miles from George Little's place and across the Teton river from the Little place; that he was with other horses; that they corraled the horses and took this particular horse out of the bunch; that he kept the horse up for sometime after taking him to St. Anthony and used him as a hack horse to ride around town and drive up the cattle, and later turned him in the pasture near town, along one side of which ran the public highway. Continuing he says: "I rode him around town, what riding I had to do around town; drove cows to pasture, rode him on the 4th of July, and kept him to drive the cows to the pasture with; kept him up for a saddle horse. Birch worked for me perhaps six weeks. Birch trimmed his tail and cut his foretop one day while I was away. I had him shod. The streets are very hard here. He had been running out and was a little sore-footed; I didn't think Kimball would want the horses ridden without it." Here the witness

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produced the order which he had received through Birch from Kimball, and the same was identified and marked defendant's exhibit "1," and is as follows:

"Victor, June 27, 1903.

"Trapper, Dear Sir: Will you git up the little brown horse fore me and take care of it, the one branded H on thi. I think he is running down around the boys somewhere.

"Your friend,

"ARCHIE R. KIMBALL."

Speaking of this order the witness said: "This is the order Birch gave me from Kimball to get the horse. It is the same order and I recognize it as such; recognize the handwriting; it is Arch. Kimball's handwriting; the same Arch. Kimball that formerly owned the horse, and to whom my brother traded it; I didn't know of Kimball ever having sold or traded the horse. I am usually known by the name of Trapper. In accordance with this order I took the horse into my possession to hold for Kimball. I had a conversation with the sheriff, Samuel Harrop, in St. Anthony on the 4th of July in regard to this horse; it took place on the ball grounds right close to the back stop. There was probably four or five hundred people around there. He spoke about the horse being a very pretty little horse, and spoke about buying him and asked me if I would sell him, and I told him that I had no right to sell the horse, that it didn't belong to me. I don't remember anything being said about the brand in that conversation; if there was I didn't understand it." The defendant further testified that he supposed the horse belonged to Kimball and that he had taken him up on Kimball's order and that he had written to Kimball's brother and told him the first time he saw him to tell him that he had taken up the horse. Says that he remembers the conversation with Little in which he asked him about the horse, but that he had never noticed any brand on this horse, except the lazy JH, and that his recollection is that Little asked about a little black horse; that he, the defendant, owned several hundred head of horses, and believing that this horse belonged to Kimball he never thought of Little referring to this animal. He then refers to some of the conversations about which the wit-

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nesses for the state had testified, none of which seem to contain any material facts. He further testifies that he never saw Kimball after receiving the order for the horse until the day he was arrested when Kimball came to St. Anthony, and defendant saw him about the time he was arrested.

Archie R. Kimball was next called and testified, on the part of defendant, that he resided at Victor, Bingham county, and had lived there nine years; was a farmer and engaged in the cattle business, and that he was at one time the owner of the horse which had been taken from the defendant, and that he had purchased the horse from Ed. Seymour, a brother of the defendant, in the fall of 1896, and some two years afterward sold him to one Harkness; that he had received a letter from his brother in law, Jack Edmiston, requesting him to take up this particular horse, stating that he, Edmiston, was the owner of the horse, and that the horse had gotten away from him somewhere in the Teton Basin; and that after receiving this letter from Edmiston he was riding one day on the range looking for horses and passed Seymour's place, and stopped and inquired for Seymour, and found that he was not at home, but met Birch at the place, who was then working for Seymour, and he went into the house and wrote the order, defendant's exhibit "1," and left it with Birch and requested him to deliver it to Seymour when he returned home; that Seymour was frequently called "Trapper," and that that was the reason why he addressed him as he did. Kimball identified the handwriting of defendant's exhibit "1," and testified to writing the order and that he didn't see Seymour from that time until the day of his arrest, and had no communication with him in the meantime. The letter from Edmiston to Kimball was identified by the witness, marked defendant's exhibit "2," and introduced in evidence, and is as follows:

"Wilson, Wyo., June 3d, 1903.

"Dear Brother Arch: Will you git that little brown horse that you oned fore me. I brot it down to the north end of the Basin, and he got away from me as soon as I got home with him.

From your brother,

"JACK EDMISTON."

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Witness testified that the exhibit was received by him through the mail, and was in the same condition that it was in when he received it.

R. A. Birch, the next witness for the defendant, testified to being at Seymour's place in June, 1903, at work for Seymour, when Kimball came to the place and had a talk with him about Seymour's whereabouts and inquired concerning this particular horse, and wanted Seymour to take him up if he found him, and finally went into the house and wrote the order, defendant's exhibit "1," which he left with Birch to be given to Seymour, and that he delivered the order to the defendant when he returned home. That thereafter, and in the latter part of June, the witness and defendant were riding in the Teton Basin and found this horse and took him up and brought him to St. Anthony with their other horses; that he was kept in the town of St. Anthony for some time, and then in the pasture close by and that they rode him and used him about town, and that Seymour never claimed to own the horse and had all the time represented that he belonged to Kimball. He also said that he roached the horse's foretop and clipped his tail as he was in the habit of doing with other horses.

William Jerrard, a farmer living near Chester, in Fremont county, testified to being present in St. Anthony on the day of defendant's arrest and hearing the conversation between Ferry Little and the defendant, and that Little asked the defendant if he had seen a little black horse running with a brown-eared horse on the range, and that the defendant told him he had not, and then related a general conversation which took place between the parties concerning the horse which Little was inquiring about.

Charles Coxsen, a liveryman at St. Anthony, testified that he had seen the defendant with this horse several times about town, and that he had examined the horse and talked to the defendant about buying the horse from him; that the defendant declined to sell him and stated to him that he was not the owner of the horse, and had no right to sell him, but that he belonged to Kimball.

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R. A. Osborn, a rancher, residing at St. Anthony, testified to seeing Seymour with the horse several times and seeing him riding it, and to having tried to buy the horse from Seymour, and that the defendant declined to do so, and stated that the horse did not belong to him, but belonged to Kimball.

Alonzo Daw, a rancher living near St. Anthony, testified to substantially the same as Coxsen and Osborn, that the defendant had stated to him the horse didn't belong to him, but belonged to Arch. Kimball.

The foregoing constitutes the material facts produced by the defendant in his defense. The state thereupon produced one E. D. Jones as a witness on rebuttal, the substance of whose testimony was that he was acquainted with John Edmiston, and that he had seen him write his name; that he had a bill of sale for an animal which Edmiston had sold to the Victor Mercantile Company on July 7, 1903. After identifying the signature as being that of Edmiston, the state offered the document, being plaintiff's exhibit "A," in evidence as an exemplar, for the purpose of enabling the jury to compare the signature of Edmiston as contained on defendant's exhibit "2" with Edmiston's signature as contained on this exemplar, plaintiff's exhibit "A." The defendant objected to the introduction of this exhibit, and the objection was overruled by the court, and the exhibit was introduced and was admitted in evidence, and allowed to go to the jury for the purpose of comparison of handwriting.

It will be seen from the foregoing testimony as given by the witnesses that the only incriminating fact of any consequence produced by the state against the defendant was that the animal was found in his possession, and that it was the property of the prosecuting witness, Little, and not the property of the defendant. It will also be observed that the defendant never at any time is shown to have claimed the property as his own or to having any right to the property, other than under and by authority of this order received from Arch. Kimball. There is absolutely no conflict of evidence in this case upon any of the material issues. The defendant admits having possession of the property and that it was not his own. He shows that

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he took the property in good faith, or apparently so at least, and under and by authority of an order from one whom he supposed to be the owner of the property; that when approached by persons who wanted to buy the horse he told them that he was not the owner of the horse and had no right to sell him, and that the horse belonged to Kimball. A careful examination of this record convinces us that the defendant must have been convicted upon the strength of plaintiff's exhibit "A," and on the theory that the signature to this exhibit is not the same as the signature to defendant's exhibit "2," which Kimball claims to have received through the mail from Edmiston. The two signatures may or may not have been written by the same person, but whether they were or not, that fact cannot be material in establishing the guilt of the defendant. That would have become a proper subject of inquiry had they been trying Kimball for the larceny of this animal and he had produced the letter, defendant's exhibit "2," as a justification for the taking, but upon this trial of Seymour, such evidence was immaterial, unless the state could show defendant's knowledge of the existence and fictitious character of the letter.

In this court some importance has been attached to the fact that Kimball at one place in his testimony said he received the letter, defendant's exhibit "2," about the 3d or 4th of July, which was after the date of defendant's taking the horse. The letter bears date "June 3d," and at another place in the witness' testimony he states that he received the letter soon after it was written. There is no evidence as to when it was written, except the date it bears. Again, it appears that the witness wrote the order, defendant's exhibit "1," after receiving the letter of June 3d, and it is undisputed that the order was delivered in June. It is therefore clear to my mind that the matter of this date is a mistake, either in making up the record or in the witness giving the name of the month. At any rate, it does not appear from the record that any importance was placed on this date in the trial court, as the witness' attention does not appear to have been called to this fact by cross-examination or otherwise. It could make no difference, however, to the defendant whether Kimball had received instruc-

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tions from anyone to take up this horse or not, if he represented to the defendant that he had a right to the possession of the animal and instructed and ordered the defendant to take him up, and the defendant did so in good faith and never assumed to own the horse himself. These facts were sufficient to establish a want of criminal intent on the part of the defendant in the taking, and would therefore make his acts fall short of larceny. The defendant's explanation of his possession was reasonable and fair, and amply corroborated and uncontradicted in every respect, and should not have been disregarded. The undisputed evidence in this case is not only entirely consistent with defendant's innocence, but inconsistent with his guilt, and if the settled rules of law uniformly recognized in the trial of criminal cases are to be applied in this case, it becomes our duty to so declare and grant the defendant a new trial. In *State v. Nesbit*, 4 Idaho, 548, 43 Pac. 69, this court, speaking through Mr. Justice Sullivan, said: "Conceding that there is circumstantial evidence against defendant tending to establish his guilt, those circumstances can be and are as reasonably explained on other hypotheses than that of defendant's guilt or as perfectly consistent with defendant's innocence, and for that reason a new trial should have been granted." To the same effect, see *State v. Mason*, 4 Idaho, 543, 43 Pac. 63; *State v. Crump*, 5 Idaho, 166, 47 Pac. 814; *State v. Seymour*, 7 Idaho, 257, 61 Pac. 1033; *State v. Marquardsen*, 7 Idaho, 352, 62 Pac. 1034; *State v. Seymour*, 7 Idaho, 548, 63 Pac. 1036.

There is only one other assignment of error which requires our consideration, and that is as to the admissibility of plaintiff's exhibit "A," which was admitted in evidence for the purpose of comparison of handwriting. On this question counsel for the respective parties have furnished us exhaustive briefs containing a great array of authorities. The same question has been considered by this court once before and was there resolved against the contention now made by the state. In *Bane v. Guinn*, 7 Idaho, 439, 63 Pac. 634, this court said: "In this state, in an action involving the genuineness of a signature, only such papers as are admitted in evidence in the case for other purposes and such as are admitted to be genuine should,

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except in very exceptional cases, be admitted for the purpose of comparison." It can at once be seen that this case must either be reversed on account of the error committed in the admission of the state's exhibit "A," or the case of *Bane v. Gwinn* must be overruled.

After an examination of the various authorities on this subject we are not inclined to depart in any material respect from the rule as announced in *Bane v. Gwinn*. It seems to us that the correct rule which should prevail in this state where we have no statute covering the admission of such evidence, is stated by Mr. Greenleaf at section 581, volume 1 of his work on Evidence, fifteenth edition, where he says: "But, with respect to the admission of papers irrelevant to the record, for the sole purpose of creating a standard of comparison of handwriting, the American decisions are far from being uniform. If it were possible to extract from the conflicting judgments a rule, which would find support from the majority of them, perhaps it would be found not to extend beyond this: that such papers can be offered in evidence to the jury only when no collateral issue can be raised concerning them, which is only where the papers are either conceded to be genuine or are such as the other party is estopped to deny, or are papers belonging to the witness, who was himself previously acquainted with the party's handwriting, and who exhibits them in confirmation and explanation of his own testimony." To the same effect see 15 Am. & Eng. Ency. of Law, 2d ed., 268, notes and authorities cited.

We therefore conclude that the trial court committed error in the admission of plaintiff's exhibit "A." It should be further observed in this connection that the genuineness of the signature of this witness was not admitted by the defendant, and indeed it does not appear that either he or any of his witnesses were familiar with the handwriting of the man Edmiston, and he was therefore not in a position to know anything as to the genuineness of the signature, and as we have before observed, it was a matter entirely immaterial to the issues in the case and so foreign and collateral to the real issue that it should have been excluded for that reason alone.

The judgment will be reversed and a new trial granted.

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STOCKSLAGER, C. J., Concurring.—I have read the evidence in this case and carefully considered the briefs of counsel, together with all the facts disclosed by the record with a view of sustaining the judgment if it could be done under the well-established rules governing the trial of cases of this character. In my view of the case the record fails to show any circumstance, any fact or condition that warranted a conviction of the defendant on the charge of the larceny of the horse in question. The fact that he repeatedly disclaimed ownership of the horse and gave the name of the owner as he understood it; and the additional fact that he did not in any way try to conceal his possession of the horse, but, to the contrary, rode him on the streets of St. Anthony at a time when an unusual number of people were in the town; the further fact that he did not give the name of an unknown person or stranger as the real owner of the horse—are all circumstances going to show that he was in innocent possession of the animal. It will not do to say that all the parties who testified on behalf of defendant were in collusion to steal a horse, defendant being the beneficiary. Parties charged with crime of any kind have the benefit of a presumption of innocence until the contrary is shown.

While I am always in favor of enforcing the criminal laws of the state, and very much disinclined to disturb the verdict of a jury and the action of the trial court in refusing to grant a new trial, yet I cannot find sufficient evidence in the record to warrant a conviction of the defendant on this charge.

SULLIVAN, J., Dissenting.—I cannot concur in the conclusion reached by my associates. And although Mr. Justice Ailshie in the opinion of the majority of this court has set forth much of the evidence in said case, I shall of necessity have to quote considerable of the evidence literally as it appears in the transcript in order to show the inconsistency of the defendant's defense and the conflict in the evidence.

Samuel Harrop, sheriff, testified that he was acquainted with the defendant and with the horse in question. "He is a little brown horse, branded with three bars on the left shoulder and also JH on the left thigh. . . . I saw the defendant riding

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the horse on the fourth day of July in St. Anthony, Fremont county, Idaho, and had a conversation with him; I talked with the defendant about the horse and about his being a nice little horse, and asked him if the brand on the left shoulder was *three bars and he said it was.*"

Ferry Little testified: "I saw the defendant during the month of July and talked with him about the horse; I saw him about the 13th of July, 1903, at St. Anthony; I asked him if he had seen a little *brown horse, branded three bars on the left shoulder*, during his rides, *and he said he had not noticed him*, . . . and he said if he had seen the horse I was inquiring for he would either send the horse to me or let me know about it; *I told him of the three bar brand on the horse.* Q. Did you say anything about the color of the horse? A. Yes, sir. Q. What did you say? A. I asked him about a *brown horse*, dark brown; the three bar brand was a plain brand, and could readily be seen; the other was quite dim; the horse was fat in June, fat and sleek, short hair, just shed off; brands are more easily seen during that time of year; when I got the horse from the county stable there was a change in him; his foretop was roached, and his tail was trimmed out, and he had two shoes on his front feet; there was no shoes on him when we turned him out; the horse was turned over to me by the sheriff, Mr. Harrop."

Ed. S. Little testified he was acquainted with the defendant and saw him in St. Anthony shortly after he was arrested. "He said Ferry had inquired for the horse, *but it looked like he had told Ferry a damned lie about the horse, because he didn't notice the brand on him, the three bars on the shoulder that is, Seymour had not noticed the brand.*"

Cross-examination: "This conversation was just after Mr. Seymour's arrest and before the preliminary. *He didn't tell me in that conversation who the horse belonged to or how he came to have it.*"

Recross-examination: "Defendant didn't say at that time that Ferry had spoken of it as a black horse *and didn't mention Kimball's name in the conversation*; I don't think Kimball was

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in town at that time; nothing was said about me seeing Kimball, I swear positively to that; *Mr. Kimball's name was not mentioned.*"

Emery Seymour testified, on direct examination, as follows: "Birch trimmed his tail and cut his foretop one day while I was away like he did the rest of the saddle horses; I had him shod. . . . I had a conversation with the sheriff, Sam Harrop, in St. Anthony on the 4th of July last in regard to this horse. . . . I don't remember anything being said about the brand in the conversation; if there was I didn't understand it; there was a large crowd and everybody talking; *I didn't at that time know anything about the horse being branded three bars.* . . . The conversation I had with Ferry Little. . . . I met Mr. Little and he asked me if I knew anything of a little *black* horse that was running with a dock-eared horse that run on Badger creek. . . . I had a conversation with Ed. Little at the county barn in St. Anthony the day I was arrested. As near as I can remember we were talking about this horse, *and I told him that Arch. Kimball had told me about the horse;* that he told me to get him for him, and referred him to Arch. Kimball and he didn't seem to care about talking to me; . . . *I didn't say to him that I told Ferry Little a damned lie or words to that effect.*"

Cross-examination: "In the conversation with Ferry Little at St. Anthony, Idaho, he said something about my brother owning the horse, and I told him my brother owned a good many horses; don't remember whether he said Kimball once owned the horse or not; don't think he did. He spoke about my brother owning this horse, this little black gelding; . . . *I got the horse in question about the latter part of June;* Kimball lived at Victor during last June, twelve or thirteen miles from the range; my ranch is right north of Victor, and Ed. Little's place is a little bit north of my ranch. I took the horse to St. Anthony because he told us to gather this horse, or get him, and we were coming down to St. Anthony, and I brought him right along; *I wrote to Kimball that I had the horse.* Q. Ever notify Kimball that you had the horse? A. I wrote him. Q. Did you not testify at the preliminary that you did not notify him?

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A. I don't think I did. Q. When did you write him? A. I don't know; I wrote him sometime after I took the horse down; I remember now about that. I wrote his brother at Driggs; told him to tell Arch. that I got the horse for him; I had the horse at St. Anthony between two and three weeks; I don't think I told any of the Littles anything about the order; I had the order at that time; but didn't mention the fact, but told Ed. Little *I got the horse for Kimball*. Kimball came down the very day I was arrested, I don't think it was an hour before, and I saw him about the middle of the street, *but after I was arrested* I told him Kimball was in town, and he could go up and see him; . . . Kimball never told me in any other way than through the order to get the horse; . . . Q. You say Bob Birch trimmed out his mane and tail after you got him down to St. Anthony? A. He trimmed his tail out and clipped his foretop out. Q. You did not do this? A. No, sir. Q. Did you not testify at your preliminary examination that you did do it? A. No, sir. Q. I will ask you if in response—if that this was not your testimony? (Soule, reading from defendant's deposition given at the preliminary.) 'Q. Is not the horse in question a very dark brown or black? A. Nothing black about him at all. Q. Did you trim the foretop and tail of the horse in question? A. Yes, sir. It was trimmed off while I had him.' Q. And this is your testimony, is it not, Mr. Seymour? A. I don't know whether it is or not. Q. I will show it to you—here is the question—you may read it, and I will ask you if this is not your testimony, if this is not your signature to it? A. Yes, that is my signature. Q. There is the question. A. I don't know why I should testify to anything of the kind at all. Q. You did testify to this, did you not? A. I did, I guess. Q. Where did you do this? Where did you trim out his mane and tail, his foretop and tail? A. It don't seem to me that I trimmed it out at all. We always trim our saddle horse tails out because they catch in the quirt and spurs; they was unhandy. Q. I will read some more: 'Did you trim the foretop and tail of the horse in question? A. Yes, sir. Q. When did you do this? A. Right here at home in twon, on or about the 2d or 1st of

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July.' I presume it was trimmed about that time; I don't remember of trimming it myself. Q. Is not that your testimony? A. That's what I testified to there; I don't remember of trimming the horse's tail or foretop; have trimmed lots of colts and like as that, but as near as I can remember Mr. Birch done them, although I might have testified that I did at the preliminary; . . . when Kimball came to town something was said about the horse; he went down to the store and when I saw him again I was arrested, and the next time I saw him the sheriff was with me; *I think that was the first time we talked about the horse*; he was at the house a very few minutes; I couldn't say positively if he spoke to me about the horse or not; I know that he knew about it; I knew where Kimball lived; *I never notified him in regard to the horse other than through his brother.*"

Archie R. Kimball testified as follows: "I am acquainted with one Jack Edmiston; he is a brother in law of mine; he did reside at Wilson, eighteen miles east of Victor in the state of Wyoming, in the Jackson Hole country. *About the 3d or 4th of July* I received through the mail a letter from my brother in law, Jack Edmiston, in reference to a horse. [Witness handed defendant's exhibit "2."] This is the letter I received from Jack Edmiston; I am not acquainted with his writing; . . . I then went back and wrote this order, and asked Mr. Birch to hand it to him. [Witness handed defendant's exhibit "1."] This is the order I wrote on that occasion; this is my handwriting, and it was written at the Seymour house, and it was the one that I gave to Mr. Birch; I did not at any time after that receive any information with reference to the horse I was writing about, or that the order referred to; I have a brother in that section by the name of Ray Kimball. Q. You may state whether or not you had any communication with him [Ray Kimball, witness' brother] on the subject? A. Not on the horse; never mentioned the horse to me at all. Q. Did he mention receiving any news about the horse? A. No, sir."

Archie R. Kimball, recalled: "I have not talked or corresponded with him [Jack Edmiston] about this horse since he wrote me the letter. He left and I never had a chance to write

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him that I found the horse referred to; never wrote him that I had the horse, or that I told Kimball to get the horse; I told Seymour; made no effort to tell Edmiston as to what I had done, and have not since; and didn't go to St. Anthony to find out about the horse; made no effort to find out whether Seymour had the horse or not, and never hunted for the horse any longer; didn't care whether I got him or not; I was riding, looking out for stock, after I gave the order; I never bothered my mind about the horse; never inquired whether Seymour got him, cared nothing about it; I came to St. Anthony the day of the hearing; I met Seymour the day of his arrest before he was arrested, and talked a few minutes with him, *but said nothing about the horse; didn't mention it.*"

R. A. Birch, cross-examination: "He [meaning Arch. Kimball] did not say anything about this horse being the horse belonging to some fellow by the name of Jack Edmiston; The only brand I saw on the horse was a lazy JH on the left thigh; I didn't look for any other, never saw any other brand on the horse, but I did not examine the horse very close; I am not acquainted with the three bar brand; I am not acquainted with the little horse; the horse was in the barn on the 3d of July; I never saw the three bar brand on this horse; I rode him several times, and bridled and saddled him several times; what particularly called my attention to the JH brand was by seeing it; the horse was running by me when I noticed the brand."

In addition to the oral evidence there were four exhibits. One is dated June 27, 1903, and is the order given by Kimball to the defendant requesting him to take up and care for the horse in controversy, which letter is quoted in the opinion of Mr. Justice Ailshie. Exhibit "2" purports to be a letter from Jack Edmiston to Archie Kimball, and is also quoted by Mr. Justice Ailshie. Exhibit "A" was a bill of sale written by John Edmiston and introduced as an exemplar. Exhibit "4" was a copy of exhibit "1," and was written by the witness Kimball during his examination as a witness on the preliminary examination.

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Seymour's defense was that he had taken possession of said horse on the request of Kimball as set forth in said exhibit "1," and Kimball testified that he wrote said exhibit "1" because of having received said exhibit "2," that being a request from John Edmiston to said Kimball to take possession of said horse. It is contended by counsel for the state that both of said exhibits were written by said Kimball, and were written after the defendant had taken possession of said horse. The above testimony shows that he took possession of the horse on or about the twenty-ninth day of June, 1903. He found him on the range a short distance from the owner's ranch. Exhibit "A" was shown to have been written by John Edmiston and was introduced as an exemplar, and I think it is clearly evident from said exemplar and the two other exhibits that Kimball wrote both exhibits "1" and "2," and I think it is clear that said defense of the defendant was clearly a fabrication and gotten up between Kimball and the defendant, and that the jury were fully justified in coming to that conclusion.

Kimball testified that "about the 3d or 4th of July I received through the mail a letter from my brother in law, Jack Edmiston, in reference to the horse." Said letter was exhibit No. "2." How would it be possible for Kimball to base exhibit "1," which is dated June 27, 1903, on a letter not received by him until the third or fourth day of July, 1903? He didn't receive the Edmiston letter until six or seven days after exhibit "1" was received, and Seymour, according to his own testimony, had taken possession of the horse about the 29th of June—four or five days before Kimball had received the Edmiston letter. This circumstance is enough to brand both letters as a put-up job, and the jury no doubt so concluded. And again, the sheriff testified that he saw the defendant riding said horse on the fourth day of July in St. Anthony, and had a conversation with him in regard to the horse and asked him at that time if the brand on the left shoulder was three bars, and he said it was. That statement is half denied by the defendant when he testified that he didn't remember anything about said brand being mentioned in the conversation with the sheriff, and that he didn't know anything about the

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horse being branded three bars at that time. It is a little remarkable that an experienced horseman, such as the defendant is shown to be, would not notice a plain three bar brand on the left shoulder of an animal that he had ridden a number of times, as the evidence shows he had this horse. The evidence shows that he had noticed a very dim lazy JH brand on the left hip, and, as most horsemen mount a horse from the left side, to say the least, it is very remarkable that the defendant observed the very dim brand on the left thigh and had not seen the very plain three bar brand on the left shoulder. Suffice it to say the sheriff swears positively that he asked the defendant if the brand on the left shoulder was three bars and the defendant said it was. This conversation occurred on the fourth day of July.

Ferry Little testified that on about the thirteenth day of July, 1903, he asked the defendant if he had seen a little brown horse branded three bars on the left shoulder, and the defendant said he had not noticed him, and at that time he had this horse in his possession in his pasture some few miles from St. Anthony. Little swears positively that he told the defendant of the three bar brand on the horse and requested him to send the horse to him or let him know if he had found him. Little also described the horses with which the brown horse was running. Defendant denies that Little ever asked him about a little brown horse, but swears he asked him about a little black horse. Isn't it a little remarkable that the said witness, Little, would ask the defendant about a little black horse when his father had not lost a little black horse, but had lost a little brown horse branded three bars on the left shoulder? Could it be possible that Little was inquiring about a horse that had not been lost? He knew his father had lost a little brown horse with a three bar brand on the left shoulder, and that was the horse that he was inquiring about. Can it be possible that Little requested the defendant to keep an eye out for a horse that hadn't been lost? The jury evidently didn't believe the defendant's story about Little inquiring for a horse different from that which his father had lost. It seems to me that one who would believe that Little was around in-

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quiring for a horse that had not been lost must be possessed of an extraordinary amount of childlike credulity, simplicity and faith. It might do to tell such story to the marines, but a jury of sensible men were warranted in disbelieving such improbable statement.

And again, E. S. Little testified that he had a conversation with the defendant shortly after he was arrested, and defendant stated to witness that Ferry, meaning Ferry Little, the former witness referred to, had inquired for the horse, but it looked like "he had told Ferry a damned lie about the horse, because he didn't notice the brand on him, the three bars on the shoulder." The defendant also denies this testimony. The jury evidently believed the testimony of said witness, as it had a right to do. The defendant took this horse from the range not far from Kimball's ranch, and instead of sending him to Kimball, he took him in an opposite direction from Kimball's ranch to St. Anthony, some forty miles from Kimball's ranch. He made no effort by letter or otherwise to inform Kimball that he had the horse, except that he says he wrote Kimball's brother. Kimball testified that he saw his brother every day or so, and his brother didn't mention the horse or the letter to him. The defendant testified that Kimball knew he had the horse. Kimball testified that he knew nothing of the kind. The defendant testified that he trimmed the horse's tail and mane and roached his foretop and put shoes on him, and admits in his testimony that he swore falsely in regard to the matter, and that Birch, a friend of the defendant's, did it. The defendant testified that he told the owner, Little, that he had taken up the horse for Kimball. The owner testified that he never told him anything of the kind. We might go further and show other contradictions, but the above is sufficient. Can it be said after a careful examination of all of the evidence in the case that there is no substantial conflict in the testimony in this case, or that defendant established the fact that he came into possession of said horse innocently? I think not. There is substantial contradiction and impeachment of the defendant, and the jury was fully justified in reaching the conclusion that the defendant was guilty. There were three witnesses procured

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by the defendant who testified under the objection of counsel for the state that they had a conversation with the defendant in which he stated to them that he didn't own the horse, or that he purchased him from some unknown person. Said statements were self-serving, and the jury had a perfect right to so consider them. If in this state thieves are going to be turned loose when caught with recently stolen property, because they have said to some of their pals or others, perhaps, that they didn't own the horse, it would not be much use to attempt to convict that class of criminals in our courts.

In the opinion of the majority it is held that the admission of the bill of sale signed by Edmiston, and admitted as an exemplar, was reversible error. I do not so consider it. The man who saw Edmiston write that bill of sale appeared on the stand and testified that he saw him write it and sign it. There was no contradiction of that testimony. It is stated in note 2, page 270, 15 American and English Encyclopedia of Law, as follows: "The danger of raising collateral issue is slight when the proof of the standard is clear." In the case at bar the proof of the standard was clear. There was no collateral issue raised as to that fact or over the said bill of sale. That being true, said exemplar was properly admitted under the exception to the general rule as laid down in the majority opinion. The judgment should be affirmed.

(March 10, 1905.)

SHELBY v. FARMERS' CO-OPERATIVE DITCH COMPANY.

[80 Pac. 222.]

DITCH COMPANIES—CORPORATIONS OR PERSONS—HOW MAY ENFORCE PAYMENT FOR USE OF WATER.

1. A canal or ditch company, corporation or person owning and operating a canal or ditch in this state, may require the claimants of water from such canal or ditch to pay or secure to be paid in advance before such canal or ditch company, corporation or per-

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son owning or operating such ditch or canal can be required to furnish any water from such ditch or canal to any of the users thereof for any purpose. (Sess. Laws 1899, p. 382, sec. 19.)

2. If such canal or ditch company or person fails to require such payment or security therefor, and does furnish any of the users of the waters of such canal or ditch with water for any purpose, the remedy is by suit at law to enforce such payment and not by rule or regulation refusing to furnish water until such arrearages are paid. (Rev. Stats. 1887, sec. 3203.)

(Syllabus by the court.)

APPEAL from District Court of Canyon County. Honorable George H. Stewart, Judge.

Action to restrain respondent from conveying three hundred and twenty inches of water past his headgate to which he alleges title. Judgment for defendant, from which plaintiff appeals. Reversed.

Alfred A. Fraser, for Appellant.

The court erred in finding as a conclusion of law "that it is a reasonable rule and regulation of the company that, before turning water out to plaintiff he shall be required to pay the company his proportionate share of the operating and maintaining expenses of the ditch for the previous irrigating season." There was no evidence introduced upon the trial of this case in the court below which can sustain the above finding. There is no evidence introduced that the company ever made such a rule or regulation, and if such a rule or regulation had been regularly adopted by the board of directors of the corporation it would be void, for the reason that such a rule, when adopted by a company, must be general in its application and apply to all persons alike. The company is not at liberty to single out the plaintiff herein and pass a rule or regulation which would apply only in his case. (*Owensboro Gas Light Co. v. Hilderbrand*, 42 Ky. Law Rep. 983, 42 S. W. 351.) There is no statute in this state granting to water companies the right to adopt any such rule or regulation. The laws governing the distribution and use of water provide the remedy and the manner in which companies engaged in this business must furnish water and col-

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lect the rates therefor. (Laws 1899, Fifth Sess., p. 382, sec. 19; Rev. Stats. 1887, sec. 3203.) Even in case where there is a statute providing that a company shall have the right to refuse to deliver water until the past rent due has been paid, it has been held that this rule does not apply when there is a dispute as to the amount which is due said corporation or company for its past services. (*Sickles v. Manhattan Gas Light Co.*, 64 How. Pr. 33; affirmed in 66 How. Pr. 304.) When a dispute arises between the company and a consumer, the latter is entitled to have his right investigated by the courts. In such a case an injunction will be granted to prevent cutting off the supply of gas until the cause is tried. (*Wood v. Auburn*, 87 Me. 287, 32 Atl. 906, 29 L. R. A. 376.) The company is not the sole judge of the validity of the bill, and cannot deprive the plaintiff of his right to resort to the courts. (*Smith v. Gold & Stock Tel. Co.*, 42 Hun, 454; *Sickles v. Manhattan Gas Light Co.*, 64 How. Pr. 35; *Morey v. Metropolitan Gaslight Co.*, 6 Jones & S. 185; *State ex rel. Webster v. Nebraska Telephone Co.*, 17 Neb. 126, 52 Am. Rep. 405, 22 N. W. 237; *American Water Works Co. v. State ex rel. Walker*, 46 Neb. 194, 50 Am. St. Rep. 610, 30 L. R. A. 448, 64 N. W. 711; *Shepard v. Milwaukee Gaslight Co.*, 6 Wis. 539, 70 Am. Dec. 479.) The transfer of the property of the Idaho Irrigating and Colonization Company to the Farmers' Co-operative Ditch Company was absolutely void as against public policy, and gave to the defendant herein no rights whatever in or to said property, or any part thereof, and no right to collect rates from this plaintiff or anyone else for the use of water out of said ditch. A corporation engaged in a public or quasi public business cannot transfer its property or franchises to any other corporation without an express act of the legislature, authorizing such sale or transfer. This proposition is clearly maintained in *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. ed. 950. That was the case of a lease of railroad and franchise. The court said, speaking through Mr. Justice Miller: "Where a corporation like a railroad company has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the con-

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sideration of the public grant, any contract which disables the corporation from performing those functions—which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes—is a violation of the contract with the state, and is void as against public policy. (*Visalia Gas & Electric Light Co. v. Sims et al.*, 104 Cal. 326, 43 Am. St. Rep. 105, 37 Pac. 1042; *Central Transfer Co. v. Pullman Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. Rep. 478, 35 L. ed. 55; *Oregon Ry. & Nav. Co. v. Oregonian Ry. Co.*, 130 U. S. 1, 9 Sup. Ct. Rep. 409, 32 L. ed. 839; *People v. Chicago Gas Co.*, 130 Ill. 268, 17 Am. St. Rep. 319, 22 N. E. 798, 8 L. R. A. 497; *Gibbs v. Gas Co.*, 130 U. S. 411, 9 Sup. Ct. Rep. 553, 32 L. ed. 985.)

Smith & Plowhead, for Respondent.

We ask the court to consider, in the first place, the specifications of error as set forth in appellant's brief, as we contend that under the statutes of this state and the decisions of this court, the findings in this case and the judgment cannot be considered for insufficiency of the evidence to sustain the same, for the reason that appellant has not specified in the transcript or bill of exceptions the particulars in which the evidence is insufficient to sustain said findings. We understand the rule to be that, in order for the appellate court to review the findings or judgment for insufficiency of the evidence to sustain the same, the party specifying such insufficiency must, in his transcript or bill of exceptions, set forth the particulars in which the evidence is insufficient to sustain such findings and judgment. (See Rev. Stats., sec. 4428; *O'Connor v. Van Hoy et al.*, 29 Or. 505, 45 Pac. 762; *Snell v. Payne*, 115 Cal. 213, 46 Pac. 1069; *Warren v. Stoddart et al.*, 6 Idaho, 692, 59 Pac. 540; *In re Fath's Estate*, 132 Cal. 609, 64 Pac. 995; *Hollister v. State et al.*, 9 Idaho, 8, 71 Pac. 541.) Can the respondent reasonably refuse said water to said appellant until he has paid his proportionate share of the cost of maintaining and operating said canal for the previous season, or is respondent left to its legal remedy alone to collect unpaid assessments? A water company may make reasonable rules for the govern-

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ment of its customers' supply of water as a penalty for violation thereof, when such rules are embodied in its contract with its consumers, or such contract is made subject to the rules and the customer is furnished with a copy of such rules before violation thereof and before his water was shut off. (*Shiras v. Ewing*, 48 Kan. 170, 29 Pac. 320; *Tacoma Hotel Co. v. Tacoma Light & Water Co.*, 3 Wash. 316, 28 Am. St. Rep. 35, 28 Pac. 51, 14 L. R. A. 669; *American Water Works Co. v. State*, 46 Neb. 194, 50 Am. St. Rep. 618, 64 N. W. 711, 30 L. R. A. 448; *Middlesex Water Co. v. Knappman Whiting Co.*, 64 N. J. L. 240, 81 Am. St. Rep. 467-488, 45 Atl. 692, 49 L. R. A. 572; *Walanga Water Co. v. Wolfe*, 99 Tenn. 429, 63 Am. St. Rep. 841, 41 S. W. 1060.) The next question raised is that the Idaho Irrigating and Colonization Company had no right to transfer its property to the respondent company or others. This is also a new question here, and we do not think that this court will consider it as presented, as the appellant has recognized the transfer in his pleadings, is seeking to show that he has rights which this respondent company must recognize, and asks for affirmative relief against this company, without suggesting or in any way objecting to said transfer; he does not show that he is injured in any way, that he is a creditor of the old company, a stockholder, or in any way interested in it. It is a well-established fact that corporations, or ganized as the evidence shows this company was organized, are private corporations, and in no sense come under the provisions of the rule laid down in the cases cited in appellant's brief. We have examined those cases, and not one is applicable to the facts as disclosed by the evidence in this case. In support of our contention, we beg leave to cite the following authorities: *State v. Western Irrigating Canal Co.*, 40 Kan. 96, 10 Am. St. Rep. 166, 19 Pac. 349; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *Willamette Woolen Mfg. Co. v. Bank of British Columbia*, 119 U. S. 191, 7 Sup. Ct. Rep. 187, 30 L. ed. 384; *Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co.*, 127 N. Y. 252, 24 Am. St. Rep. 448, 27 N. E. 831; *Benbow v. Cook*, 115 N. C. 324, 44 Am. St. Rep. 454, 20 S. E. 453; *Morisette v. Howard*, 62 Kan. 463, 63 Pac. 756.

Opinion of the Court—Stockslager, C. J.

STOCKSLAGER, C. J.—This is an appeal from the judgment of the district court of Canyon county. Plaintiff (appellant) filed his complaint alleging that defendant is a corporation incorporated under the laws of Idaho. "That defendant is the successor in interest of the ditch and water rights of the Idaho Irrigation and Colonization Company, incorporated under the laws of the former territory of Utah, and now owns and is in possession of the ditch and water rights of said Idaho Irrigation and Colonization Company, subject to the rights of plaintiff made to appear. That on and prior to the 8th of December, 1887, the Idaho Irrigation and Colonization Company was the owner of a large irrigating canal and the right to the use of the waters of Boise river for irrigation purposes in the then county of Ada, now Canyon, to the amount of many thousand inches, . . . the exact amount of which plaintiff is unable to state; and said corporation was at the date last mentioned and during the irrigation season of each year carrying said water through their said canal and distributing the same on lands lying along the northern side of Boise river, . . . and was during the said years, to wit, 1887, prior thereto and long since engaged in the business of carrying waters for sale and rental, . . . to which said Idaho Irrigation and Colonization Company had a good and lawful right. That on December 8, 1887, plaintiff then contemplating the entry of section 3, . . . lying under said ditch as a desert entry, purchased from said Idaho Irrigation and Colonization Company, for the irrigation and reclamation of four hundred and eighty acres of said section 3, a perpetual right to the use of three hundred and twenty inches of the waters flowing and to flow into said canal, and thereafter in the year 1892, plaintiff began the use of part of the waters to which he was entitled, and each year thereafter continued to use a portion thereof on said section 3 for irrigating purposes, until the year 1894, when plaintiff had sufficient crops under cultivation to demand the use of the whole amount of water to which he was entitled from said canal, when he began to and did use the whole amount of said waters to which he was entitled from said canal, and each and every year since down to the present

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time has continued to use the whole amount of water so purchased for the irrigation of crops, etc. That the said land will not produce remunerative crops without water for irrigation, and if plaintiff were now deprived of water for irrigation, the fruit trees, alfalfa and other crops growing thereon would dry up, die and become a total loss to this plaintiff; that plaintiff has no other means of irrigating his lands except from the said canal. That plaintiff procured from said Idaho Irrigation and Colonization Company a deed to the said water right dated the eighth day of December, 1887, a copy of which is exhibit 'A' of this complaint, and caused the same to be recorded in Ada county on the twelfth day of November, 1889, and ever since recording the said deed plaintiff has fully kept and performed on his part all the terms and conditions thereof and therein required of him. . . . Plaintiff is informed and therefore alleges the fact to be that the defendant, through different conveyances, succeeded to the right of the said Idaho Irrigation and Colonization Company, but came into such rights and the said canal long after the conveyance to plaintiff of said water right and the recording thereof as aforesaid. That the said defendant is now, and for some time past has been, operating said canal, and has during the said spring demanded of the plaintiff that he contribute a large sum of money toward paying the expenses of litigation heretofore had and now pending concerning said canal and water rights, and for extending and enlarging said canal, and plaintiff alleges that under his said deed he is not liable for any such expenditure or liable for any expense connected with said canal except such as are mentioned in said deed, viz.: a proportionate amount of the expense of maintaining and operating the same. And the defendant has, through its board of directors and other officers, threatened that if the plaintiff will not pay a portion of the said expense of litigation, enlarging and extending, it will deny him the use of any water from said canal and will so continue to deny him the use of water until all such expenditures are paid, and acting upon its said threat to deny the plaintiff water, the defendant has refused, and still refuses, to deliver the plaintiff his share of the water now flowing in said ditch,

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or any water therefrom whatever, notwithstanding, as the plaintiff is informed and believes, there is abundant water in said canal to supply the plaintiff with the full amount to which he is entitled, . . . and is now carrying the said water to which the plaintiff is entitled past and beyond the plaintiff's tap on said canal, and threatens to so continue to carry said waters past and beyond plaintiff's tap and land and deny the plaintiff the use of any of said waters until he has paid a proportion of said expenses or litigation, enlarging and extending, for which he is no way liable. Plaintiff further alleges that he is ready and willing, and has at all times been ready and willing, to pay his just proportion of all the expense of maintaining and operating the said canal, and that he is financially able to pay the same at any time, which facts the defendant and its officers and agents well know, and have at all times known. Plaintiff further alleges that he is ready to receive the said water at convenient points on the said canal, and is now in great need of the same for the irrigation of alfalfa, which will dry up and the alfalfa plants will suffer and die and become a total waste unless said water is turned out for the use of plaintiff, and plaintiff has demanded of the defendant that its officers and agents turn out to the plaintiffs his said amount of water at the proper points on said ditch for the purpose of irrigating his said land. . . . The plaintiff further alleges that he has not a plain, speedy or adequate remedy at law for the redress of the wrongs done and threatened, for the reason that the damages that will certainly result from said denial of water to the plaintiff will be of such a nature that they cannot be computed or even estimated."

This complaint is followed by a prayer following the allegations of the complaint. The provision upon which plaintiff relies in the deed referred to, and marked exhibit "A" to this complaint, is as follows:

"To have and to hold all and singular the said water rights, together with the appurtenances and privileges thereto incident, unto the said party of the second part, his heirs and assigns forever, subject, however, to the rules and regulations of said company governing the use of said water rights and to a

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proportionate amount of the annual expense of maintaining and operating the irrigating ditch owned by the said the Idaho Irrigation and Colonization Company, from which said water is to be supplied." Defendant, answering, admits all the allegations of the complaint as to it being a corporation as alleged; that it is the owner and in possession of the ditch and water right alleged, and that plaintiff purchased a perpetual water right from the Idaho Irrigation and Colonization Company, and planted crops, orchards, etc., and that he has no other source of water supply excepting through the canal of defendant.

As to the allegation that plaintiff has planted to crops of various kinds three hundred and twenty acres of land, and used all the water he purchased for use, and has said land in a high state of cultivation, that said land will not produce remunerative crops without water for irrigation and the allegation that if the plaintiff were now deprived of water for the irrigation of his land, his fruit trees, crops, etc., would dry up and die and become a total loss, and defendant has not sufficient knowledge, information or belief to answer said allegations, and he therefore denies each and every of said allegations. Admits that plaintiff has a deed as alleged, from the Idaho Irrigation and Colonization Company, but denies that ever or at any time since the year 1894, or from any other time in the year 1902, or at any time since, plaintiff has fully performed on his part all or any of the terms and conditions thereof; as to the allegation that said plaintiff has, during all the time since the year 1894, or from any other time continued to use for the purpose of irrigating the growing crops on said lands, or for any other purpose, three hundred and twenty inches of water obtained from the said canal under and by virtue of his perpetual water right, peaceably, quietly, openly, continuously, uninterruptedly and adversely to the defendant and all others, except for the wrongful acts of defendants hereinafter complained of, this defendant has no information or belief to answer said allegations and therefore denies each and every of said allegations. Admits that it is operating the canal, but denies that during the spring or at other times, or at all, demanded of plaintiff that

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he contribute a large sum of money, or any sum of money toward paying the expense of litigation heretofore had or now pending, concerning said canal and water rights, or for extending said canal, or for any other purpose except as herein-after stated. Admits that plaintiff is only liable for a proportionate amount of the expense of maintaining and operating the same. Denies that defendant, through its board of directors and other officers, or in any way or at all, threatened that if plaintiff will not pay a portion of the said expense of litigation, enlarging and extending the ditch, it will deny him the use of any water from said canal, and denies that it will so continue to deny him the use of water until all such expenditures are paid, etc. Admits there is abundant water in said canal to supply plaintiff, and defendant alleges that it is able, ready and willing to furnish plaintiff the amount of water which plaintiff claims upon compliance on the part of plaintiff with the terms and agreements contained in the deed. Defendant alleges the fact to be that it has refused to deliver to the plaintiff the water he claims or any water until said plaintiff has paid his proportionate share of the operating and maintaining expenses of said ditch, during the year 1902, according to the terms and conditions of his said deed. Denies that plaintiff is ready and willing to pay his just proportion of all expenses of maintaining or operating the canal; for want of knowledge, information or belief, defendant denies the same. Denies that the defendant, its agent or officers, or any of them, well know, or any of them have known, that plaintiff is financially able to pay, etc. Denies that plaintiff has not a plain, speedy or adequate remedy at law, and denies that the damage that will certainly or otherwise result from denial of water to the plaintiff will be of such a nature that it cannot be computed or even estimated.

Defendant further answering says: "That since May 6th, 1902, it has been the owner and etc. of the ditch or canal mentioned in plaintiff's complaint. That the stockholders of defendant are the owners of land and users of water under said canal. Then follows an averment that between the sixth day of May, 1902, and the fifth day of January, 1903, defendant expended

in maintaining and operating said ditch or canal, and not otherwise, the sum of \$4,467.75; that on or about January 10, 1903, defendant had prepared and mailed to plaintiff an itemized statement of said costs and expenses of maintaining and operating said canal, a copy of which statement is hereto attached marked exhibit 'A' to defendant's answer. That defendant is informed and believes that said statement was received by plaintiff. That with said statement there was sent to him a notice to the effect that his share of the expenses of maintaining and operating said canal for 1902 and to the fifth day of January, 1903, to wit, the sum of \$212.80, was due and payable to the secretary of defendant company at Parma, Idaho. That plaintiff refused to pay said sum or any part thereof, and ever since has failed to tender or pay to defendant said sum or any sum whatever in payment of his proportionate share, etc. That it is one of the rules and regulations of defendant that no water will be turned out at the beginning of the irrigation season to users and consumers thereunder until the assessment for maintaining and operating said canal for the previous year has been paid to the company. That said rule applies to all users of water from said canal, and plaintiff knows of said rule and was fully advised thereof. Then follows an averment that such rule is necessary in order to properly maintain and operate said canal.

"That the items incurred shown in exhibit 'A' hereof were actually necessary to properly maintain and operate said canal. And the items appearing in said statement as attorney's fees were necessary expenses incurred by defendant in maintaining and preserving the water rights belonging to said canal including the right claimed by plaintiff."

After a trial in the lower court, without a jury, the court filed findings of fact and conclusions of law, finding "that the Idaho Irrigation and Colonization Company on the eighth day of December, 1887, and some time prior thereto, was the owner of a certain ditch and the water rights, and on said day for a valuable consideration, conveyed to plaintiff three hundred and twenty cubic inches of water as measured by the mining laws of the United States and the territory of Idaho. The deed was made to plaintiff, subject to the rules and regulations of said

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company governing the use of said water rights and to a proportionate assessment of the annual expense of maintaining and operating such ditch. That thereafter and prior to the year 1902, said Idaho Irrigation and Colonization Company conveyed to defendant said ditch and water rights, and the defendant is the owner, etc. That on or about January 10, 1903, defendant prepared and sent to plaintiff a statement of the items of expense incurred by defendant in maintaining and operating its ditch for 1902. Plaintiff received said statement, but refused to pay his proportionate share or any part of his share, and at the time of the commencement of this action, to wit, on the eleventh day of April, 1903, plaintiff had not paid his proportionate share of the expenses of maintaining and operating said ditch for the irrigating season of 1902, and had not tendered to defendant said proportionate sum or any part thereof. That about sixty days prior to the commencement of this action, defendant notified plaintiff that it was one of the rules and regulations of defendant company 'that no water will be turned out at the beginning of the irrigating season to users and consumers under said ditch until the assessment for maintaining and operating said canal for the previous season has been paid by consumers to the company.' The fifth finding is that all of the items of expenditure as appears by the statement of defendant are necessary charges and properly included in the expenses of maintaining and operating said ditch and canal for the irrigating season of 1902, except \$141.07 which is itemized in the finding. The sixth finding is that the total cost of maintaining and operating the canal for the season of 1902, as claimed by the defendant, is \$4,467.75; deducting from that amount the items above enumerated amounting to \$141.07, would leave the total cost of operating and maintaining the ditch for the irrigating season of 1902, which, divided between the number of inches of water carried through said ditch, to wit, six thousand seven hundred and twenty inches, would make the charge against each inch of water supplied at sixty-four and twenty-five one-hundredths cents. The plaintiff taking three hundred and twenty inches would make his cost \$205.60."

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As conclusions of law the court finds that it is a reasonable rule and regulation of defendant company, that before turning the water out to plaintiff he shall be required to pay to the company his proportionate share of the operating and maintaining expenses of the ditch for the previous season.

Second. That before making application to the court for an injunction plaintiff should have tendered or paid to defendant his proportionate share of the cost of maintaining and operating said ditch for 1902, or such portion thereof as he himself admitted was a proper charge.

Third. Plaintiff is not entitled to an injunction and his application therefor is denied and the restraining order heretofore entered herein should be dissolved.

Fourth. That defendant is entitled to receive from the plaintiff in this action the sum of \$205.60, as plaintiff's proportionate share of the maintaining and operating expenses of defendant's ditch for the irrigating season of 1902, and costs of suit, and judgment was entered in compliance with the foregoing findings and conclusions.

It is insisted by counsel for appellant that the findings and conclusions are not warranted by the facts as disclosed by the record.

The important and controlling question in this appeal, as we view it, is whether the court erred in its first conclusion of law, to wit: "It is a reasonable rule and regulation of defendant company that before turning the water out to plaintiff he shall be required to pay to the company his proportionate share of the operating and maintaining expenses of the ditch for the previous irrigating season." It is insisted by counsel for plaintiff that there is no evidence in the record showing that the defendant company ever made such a rule or regulation, and if such a rule or regulation had been regularly adopted by the board of directors of the corporation, it would be void for the reason that such a rule, when adopted by a company, must be general in its application and apply to all persons alike. A careful inspection of the record fails to disclose any evidence that such a rule was ever adopted by the company. It is stated in the

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answer that such a rule and regulation existed and applied to all users of water from said canal, and that plaintiff knew of said rule and was fully advised of it. This is the only reference to such a rule, excepting in the findings and conclusions of the court. It must be apparent, under our system of irrigation in this state, that consumers of water under the large canal systems should not be allowed to hamper the companies, associations or corporations in the management of their work of furnishing water in many instances to hundreds of consumers from one canal.

The legislature in 1899 attempted to settle the question between the company, corporation, or person owning or controlling any canal or irrigation works and the consumers of water under such system, to wit: "Any person, company or corporation owning or controlling any canal or irrigation works for the distribution of water under a sale or rental thereof shall furnish water to any person or persons owning or controlling any land under such canal or irrigation works for the purpose of irrigating such land or for domestic purposes upon a proper demand being made and reasonable security being given for the payment thereof." (Sess. Laws 1899, p. 382.) By this statute it will be seen that companies, corporations or persons owning, controlling or operating canals are amply protected in the collection of their honest dues. Impecunious or dishonest persons cannot procure water for use upon their lands for a season and force the canal owner or operator to an action in court to collect for the use of such water. This is wise legislation; it protects parties who are willing to invest large sums of money in an enterprise that brings slow returns, but very beneficial and really indispensable to the community thus supplied with water. It is not an unreasonable requirement of the consumer and only furnishes the producer with reasonable protection for furnishing water.

In the case at bar it is made to appear that appellant had an absolute right to three hundred and twenty inches of water in defendant company's canal. This is conceded by the pleadings. The terms upon which it was to be delivered to him is also conceded. From a large number of letters passing from appel-

lant to the secretary of the company and *vice versa*, it is made to appear that the only question between appellant and the company was as to the amount of indebtedness due the company for maintenance and operating expenses for the year 1903, appellant insisting that the statement furnished showed an overcharge and the respondent insisting upon payment in full as shown by the statement. Upon the trial the lower court found that there was an overcharge of \$7.20 against appellant, but counsel for him insists it is much more. Section 3203 of the Revised Statutes of 1887 provides: "Where a ditch is common property, or there is a common right to the use of the water of a ditch without payment therefor, and any labor or materials are necessary for the repair or cleaning of the ditch, or any gate or flume thereon or thereunto belonging, the water master of the district may make a fair *pro rata* assessment of labor or materials against the inhabitants of the district claiming the use of such water, according to the benefits received by each; and if any person so assessed neglects or refuses, for the period of three days after notice so to do from the water master or his deputy, to furnish his just proportion of the necessary labor or materials, according to such assessment, must pay his *pro rata* in cash to be recovered, with costs, in an action by the water master in his own name."

The statute of 1899 does not repeal this section of the Revised Statutes of 1887. By construing the two sections it will be seen that the canal company in this case had its remedy in a suit at law to enforce payment of the amount due for expenses in maintaining and operating the canal for the year 1902, under the provisions of section 3203 of the Revised Statutes.

Our attention is not called to any provision of the statute of this state, neither are we able to find one, that authorizes a canal company to pursue the course taken by respondent in this case to enforce the payment of a disputed debt for water theretofore furnished appellant by respondent. It is shown by the record that appellant at all times refused to accept any terms or conditions from the respondent, except the obligations set forth in his deed. He refused to deed his property to the corporation defendant and accept stock in lieu thereof, and it is

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unnecessary to say that the successor to appellant's grantor could impose no terms or conditions upon him, by any rules or regulations of the new company, that would in any manner interfere with the rights granted him in his deed. It does not seem necessary to discuss this question further. If the defendant corporation permitted the appellant to fall in arrears for the year 1902 in the payment of his proportion of the maintenance and operating expenses of the canal, the statute gave it a remedy, and instead of threatening to shut off the water for the next year or any other time in the future, it should have followed the remedy pointed out by the statute. It is ample and sufficient for the full protection of any company, corporation or person operating a ditch or canal in this state, and if rightly enforced does not work any injustice to the user, and yet guarantees the payment of all water dues from the consumer. We think the plaintiff was entitled to an order restraining the respondent from withholding the use of the water to which he was entitled under his deed.

Respondent insists in his brief that before appellant was entitled to equitable relief he should have tendered to respondent the amount he believed he was indebted to the respondent. It is shown that appellant repeatedly notified the defendant through its secretary that he was able, ready and willing to pay any and all sums he owed the respondent for the use of water, but when the bill was submitted to him he disputed its accuracy and insisted that he was being charged with items of expense for which he was not responsible under his deed. It would seem that if plaintiff was the owner of over four hundred acres of land, three hundred and twenty of which was under cultivation, a valuable water right for such land, and no showing that a judgment against him could not be enforced, that respondent could have complied with the contract of its predecessor and furnished appellant the water his deed called for and then settled the dispute as to the water furnished prior thereto in the manner prescribed by the statute.

Many authorities are cited by counsel for appellant, as well as respondent, but in our view of the case we need not look beyond the plain mandates of the statute for a determination of the issues presented by this appeal.

Argument for Appellant.

The trial court should have granted the relief prayed for in plaintiff's complaint by granting the injunction and left the parties to settle their dispute as to the past water troubles to another action. Judgment reversed and cause remanded for further proceedings in harmony with the views herein expressed, with costs to appellant.

Ailshie, J., and Sullivan, J., concur.

(March 11, 1905.)

SCHULER v. FORD.

[80 Pac. 219.]

PARTIES AND PRIVIES TO A JUDGMENT ARE BOUND THEREBY—WHO ARE PRIVIES.

1. A judgment is conclusive, not only upon those who were parties to the action, but also upon all persons who are in privity with them.

2. A party in possession of land under contract to purchase is not in privity with the party who contracted to sell in the sense that he will be bound by the judgment affecting such property where the action was commenced subsequent to the entering into such contract.

(Syllabus by the court.)

APPEAL from the District Court in and for Washington County. Honorable Geo. H. Stewart, Judge.

Action adversing patent proceedings for title to mining property and to quiet title to an undivided interest claimed by plaintiff. Judgment for defendants, from which judgment and an order denying a new trial plaintiffs appeal. Affirmed.

The facts are stated in the opinion.

Alfred A. Fraser, for Appellant.

The defendant in this case, in order to recover, must do so upon the theory that he was a *bona fide* purchaser of this prop-

Argument for Appellant.

erty without notice of the equities of these plaintiffs at the time he made the purchase; or else he must prove title by adverse possession against the defendants. The evidence in the case clearly shows that he was not an innocent purchaser of the property, as he had notice, even according to his own statement, of the equities of this plaintiff prior to the time he paid the purchase money. (*Eversdon v. Mayhew*, 65 Cal. 163, 3 Pac. 641.) To entitle a party to protection, as such a purchaser, he must aver and prove the possession of his grantor, the purchase of the premises, the payment of the purchase money in good faith, and without notice, actual or constructive, prior to and down to the time of its payment; for if he had no notice, actual or constructive, at any moment of time before the payment of the money, he is not a *bona fide* purchaser. (*Boone v. Chiles*, 10 Pet. 210, 213, 9 L. ed. 400; *Wallyn v. Lee*, 9 Ves. Jr. 32; *Scott v. Umbarger*, 41 Cal. 419; *Taylor v. Ranney*, 4 Hill, 624; *Wells v. Morrow*, 38 Ala. 128; *Pearce v. Foreman*, 29 Ark. 568; *Wilhoit v. Lyons*, 98 Cal. 413, 33 Pac. 335; *County Bank v. Fox*, 119 Cal. 64, 51 Pac. 11; *Trice v. Comstock*, 115 Fed. 765.) In *Davis v. Ward*, 109 Cal. 189, 50 Am. St. Rep. 29, 41 Pac. 1010, the rule is there stated that where a purchaser pays only a part of the purchase price before receiving notice of the equities of another in the property, that he will be protected only to the amount of the purchase price which was paid before receiving notice of such equities, and that he is not an innocent purchaser of the property if he receives notice before final payment is made. (*McCauley v. Smith*, 132 N. Y. 524, 30 N. E. 997; *Smith v. Schweigerer*, 129 Ind. 363, 28 N. E. 696; *Lindsay v. Freeman*, 83 Tex. 259, 18 S. W. 727; *Brinton v. Scull*, 55 N. J. Eq. 747, 35 Atl. 843; *Watson v. Sutro*, 86 Cal. 500, 24 Pac. 176; *Williamson v. Brown*, 15 N. Y. 359.) Adverse possession cannot be claimed under a contract or bond for the purchase of real estate. (2 Wood on Limitations, 2d ed., sec. 260, p. 649.) The judgment introduced in evidence in this case is conclusive between these plaintiffs and the defendant, George Wirtz, as the court in the state of Washington acquired jurisdiction of the said Wirtz. And the rule is well settled that the judgment of a sister state can only be inquired

Argument for Respondents.

into on the question of jurisdiction. (2 Story's Equity Jurisprudence, secs. 895, 895a; *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93, and cases there cited.) Counsel for plaintiffs contend that under the facts in this case and the law as herein set forth, that they have a claim for a one-sixth interest in the Summit Mine superior to any title that the defendant, E. D. Ford, may have by reason of the bond to purchase said property, and upon which he had paid out no money prior to receiving notice of the claim of these plaintiffs. Possession of real property, under an executory contract, is not such possession as will constitute an adverse possession within the statute. (2 Wood on Limitations, 2d ed., sec. 260, p. 649; *Gilbert v. Sleeper*, 71 Cal. 290, 12 Pac. 172.)

W. E. Borah, for Respondents.

We call attention to the fact, in the first place, that this contract of purchase was made July 27, 1897, and possession of the property taken thereunder some nine months previous to the commencement of the suit in the state of Washington. The holder of this contract of purchase and their successors in interest had therefore acquired their interest, their property right, long prior to the commencement of the suit. They could not be deprived of their right to purchase, of their property right, without their day in court. While the judgment might establish, as between the plaintiffs in said suit and Wirtz, that the said Wirtz had no title and no right to sell said property, yet upon this question the defendants having a contract of purchase would be entitled to be heard. As we understand the law, the parties claiming an interest in this property cannot be in any manner affected by the judgment to which they were not parties or in privity with anyone who was a party, and they are not in privity with anyone unless they acquired their interest from that party subsequent to the commencement of the suit; neither would they be in privity with the estate unless they acquired their interest in the estate or property subsequent to the commencement of the suit. One cannot be a privy in an estate under a judgment or decree unless he derived his title to the property in question subsequent to and from some party

Argument for Respondents.

who is bound by said judgment or decree. (Herman on Estoppel, secs. 145, 146, pp. 155, 156; *Barrel v. Title etc. Co.*, 27 Or. 77, 39 Pac. 992; *Coleman v. Hunt*, 77 Wis. 263, 45 N. W. 1085; *Chester v. Bakerfield etc. Assn.*, 64 Cal. 42, 27 Pac. 1104.) Every person is entitled to his day in court before his rights can be concluded by its judgment, and until a person is made a party to a suit and is offered a reasonable opportunity of being heard, the court has no right to divest him of his vested right. (1 Herman on Estoppel, sec. 182, p. 201, secs. 185, 186, pp. 205, 206; *McCoy v. McCoy*, 29 W. Va. 794, 2 S. E. 809.) A judgment in an action to recover real property operates as an estoppel or *res judicata* as to all those in the case served with process of the court therein and as to all parties claiming under them who acquired their interest subsequent to the bringing of the suit. (*Provident etc. Co. v. Marks*, 6 Kan. App. 34, 49 Pac. 625; *Lattie v. Holiday*, 27 Or. 175, 39 Pac. 1102; *Williams v. Sutton*, 43 Cal. 65; 2 Jones on Evidence, sec. 603.) Persons not parties to a suit and in possession before it was brought, or those claiming under them, could not be ousted of their possession because their distinct title had not been tried. (*Sampson v. Ohlyer*, 22 Cal. 207; *Moulton v. McDermott*, 93 Cal. 660, 29 Pac. 259; *Ex parte Reynolds*, 1 Caines, 500; *Campbell v. Hall*, 16 N. Y. 575; *Hart v. Moulton*, 104 Wis. 349, 76 Am. St. Rep. 881, 80 N. W. 600; *Coles v. Allen*, 64 Ala. 105; *Winslow v. Grindal*, 2 Greenl. 64; *Powers v. Heath*, 20 Mo. 319; *Bartero v. Real Estate Sav. Bank*, 10 Mo. App. 76.) The principles for which we are contending "are fundamental; that in order that a judgment be binding upon a party he must either be a party to it or privy to someone who was a party, and in order to be such he must have acquired an interest in the property subsequent to the commencement of the suit." (24 Ency. of Law, 2d ed., pp. 746-748; *Sorenson v. Sorenson* (Neb.), 98 N. W. 837; *Hays v. Marsh*, 123 Iowa, 81, 98 N. W. 605; *Keokuk etc. Ry. Co. v. Scotland County*, 152 U. S. 317, 14 Sup. Ct. Rep. 608, 38 L. ed. 457; *Carroll v. Goldschmidt*, 83 Fed. 508, 27 C. C. A. 566; *Austin v. Hoxsie* (Fla.), 32 South. 878; *Garrison v. Savignac*, 25 Mo. 47, 69 Am. Dec. 448; *Georges v. Hufschmidt*, 44 Mo. 179;

Statement of Facts.

State v. Cin. Co., 66 Ohio St. 182, 64 N. E. 68; 2 Black on Judgments, secs, 549, 600; 1 Freeman on Judgments, sec. 154; *Bensinur v. Fell*, 35 W. Va. 16, 29 Am. St. Rep. 774, 12 S. E. 1078; *Henry v. Wood*, 77 Mo. 281; *Koontz v. Kaufman*, 31 Mo. App. 409, 14 S. W. 307; *Winston v. Starke*, 12 Gratt. 317; *Bradford v. Knowles*, 78 Tex. 109; *Boling v. Howell*, 93 Ind. 320; *Ellis v. LeBow*, 96 Tex. 532, 74 S. W. 528.)

STATEMENT OF FACTS.

The history of the transaction covered by this case and material to be considered in its determination are covered by the findings of fact made and filed by the trial judge, and are as follows:

1. "That upon the twenty-third day of April, 1898, an action was commenced in the superior court of the state of Washington, in and for the county of Spokane, by Nathan Toklas; H. W. Bonne, Ed. Erp. Brockhausen, C. J. Kemp, and Harry E. Schuler were plaintiffs, and Geo. Wirtz, John Welch, E. D. Ford, John Henderson, Joseph Phillips and the Traders' National Bank of Spokane, Washington, were defendants; that neither John Welch, F. D. Ford, John Henderson nor Joseph Phillips were served with summons or process in said action, and neither of them appeared in said action at any time by attorney or otherwise; that said cause was tried October 19, 1898, as against the defendant, George Wirtz; that findings of fact, conclusions of law and decree were entered, said decree bearing date February 16, 1900; that according to said decree it was recited and decreed *inter alia* 'that this cause was dismissed as to the defendants, John Welch and E. D. Ford, John Henderson and Joseph Phillips without prejudice,' and it was further decreed in substance that the plaintiffs were entitled to a decree for an undivided two-thirds interest in a one-fourth interest in the Summit mining claim, situated in Mountain View mining district, Washington county, Idaho. That said suit was appealed to the supreme court of the state of Washington and said decree was affirmed February 1, 1902. That thereafter a commissioner's deed was made under said decree for the two-thirds interest of said undivided one-fourth interest, which deed bore date February 20, 1900."

Statement of Facts.

2. "That on June 27, 1893, Joseph Phillips and John Henderson, who were then and there citizens of the United States, over the age of twenty-one years, located a certain mining claim in Mountain View mining district, Washington county, Idaho, to wit, the Summit mining claim; that on April 19, 1897, said Joseph Phillips and John Henderson sold and conveyed said mining claim to George Wirtz and John Welch, and that said deed was duly recorded on the twenty-third day of April, 1897, with the recorder of Idaho county; that on July 27, 1897, George Wirtz and John Welch, who were then and there in possession of said Summit mining claim, entered into a contract to sell and convey said mining claim and all thereof to C. E. Page, which contract has been introduced in evidence as defendants' exhibit "A." That said contract was shortly thereafter assigned to E. D. Ford; that there was paid on said contract to George Wirtz, on or about November 1, 1897, the sum of \$200, and that there has been paid upon the same altogether about \$2,000. That said contract covered other claims, and that the entire amount to be paid thereunder was \$40,000. That E. D. Ford went into possession of the said Summit mining claim immediately after the execution of the said contract, and not later than November 1, 1897, and, together with his associates under said contract and successors in interest, have been in possession of said mining claim ever since, and have expended large sums of money in working and developing said claim. That said contract of purchase under date of July 27, 1897, is still in force and effect, the time of payment having been extended and the sum of about thirteen or fourteen thousand dollars yet being due for said undivided one-fourth interest."

3. "That neither of the plaintiffs have at any time been in possession of said Summit mining claim prior to the commencement of this suit."

4. "That E. D. Ford acquired his interest in said property by virtue of said contract, and his right to purchase the same and his possession of said Summit mining claim under said contract long prior to the commencement of this action upon the part of the plaintiffs in the state of Washington as aforesaid."

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5. "That George Wirtz and John Welch have at all times herein mentioned been citizens of the United States, over the age of twenty-one years, and citizens of the state of Idaho since 1894. That E. D. Ford is a citizen of the United States, and has been a citizen of the state of Idaho and a resident of the state of Idaho since June 1, 1898. That the defendant is a corporation organized and existing under and by virtue of the laws of the state of Colorado, and that since October 18, 1899, has maintained its agent upon whom process could be served, within the state of Idaho, in conformity with the laws of the state of Idaho."

As conclusions of law from the foregoing facts, the court found:

1. "That these defendants were in no wise bound or affected in their rights by the judgment or decree rendered in said cause heretofore referred to in the state of Washington, and that the said judgment or decree was wholly inoperative as to these defendants and their rights under the contract of purchase and their right to the possession of the Summit mining claim or any part thereof."

2. "That the plaintiffs can take nothing by this cause of action, and that the defendants are entitled to judgment for costs and disbursements herein, and it is ordered that judgment be entered accordingly."

AILSHIE, J. (After Making Foregoing Statement).—The only question necessary for our determination in this case is whether or not the defendant Ford was bound by the judgment of the Washington court of February 16, 1900, in case of *Toklas et al. v. Wirtz et al.* Before considering that question it should be observed that the contract under which Ford acquired his interest in the property was entered into prior to the commencement of the action in the Washington court, and his entry into possession of the property was also prior to that date. It is also a conceded fact in this case that the plaintiffs in the action commenced in the Washington court had actual notice of the interest claimed in the property by Ford, as well as the constructive notice which was imparted by his posses-

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sion of the property at that time. It is admitted, on the other hand, by Ford's counsel, that he is not a *bona fide* purchaser within the meaning of the law of the interest claimed by him, for the reason that he had not made full payment of the purchase price prior to the commencement of that action.

The general rule of law applicable to a case of this kind is stated by Black on Judgments, volume 2, section 549, as follows: "It is well settled that a judgment is conclusive, not only upon those who were actual parties to the litigation, but also upon all persons who are in privity with them." This we understand to be the correct rule of law upon the subject. There is no question in this case but that the appellant, Ford, was not a party to the action wherein the judgment and decree was obtained in the Washington court. The only question, therefore, remaining to be determined is: Was he a privy to the judgment or in privity with the defendant Wirtz in that action? Freeman on Judgments, volume 1, section 162, fourth edition, in discussing the question as to who are parties privy, says: "It is well understood, though not usually stated in express terms in works upon the subject, that no one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit."

In 24 American and English Encyclopedia of Law, second edition, page 746, it is said: "Every person is privy to a judgment or decree who has succeeded to an estate or interest held by one who was a party to such judgment or decree, if the succession occurred after the bringing of the action. But in order that privity shall exist, the succession must have occurred after the institution of the suit. One who succeeded to the right of property of a party prior to that time, is not in privity with him and is not concluded by the judgment." (*Dull v. Blackman*, 169 U. S. 243, 18 Sup. Ct. Rep. 333, 42 L. ed. 733.)

In *Shay v. McNamara*, 54 Cal. 174, the court, in determining whether certain parties were privy to a judgment which had been introduced against them, said: "This was the origin of whatever interest the Johnsons acquired under the Kellys; and having originated before the commencement of the suit of

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Morgans v. Kelly, it follows that they are unaffected by the judgment in that case; for only those are privies whose interest in the subject matter of the suit originated subsequent to its commencement."

Weed Sewing Machine Company v. Baker, 40 Fed. 56, was an action in some respects similar to the one under consideration, and it was there held that: "A party in possession of land, claiming an interest as purchaser, or under a contract to purchase, is not in privity with his grantor. On the contrary, his claim is adverse to his grantor, and it must follow that he is not bound by a decree against the latter in a case to which he is not a party and rendered in a suit commenced after he purchased and took possession."

In *Seymour v. Wallace*, 121 Mich. 402, 80 N. W. 242, the supreme court of Michigan, in determining to what extent a party was bound by a judgment to which he was not made a party, quoted with approval from *Coles v. Allen*, 64 Ala. 105, the following language: "No alienee, grantee, or assignee is bound or affected by a judgment or decree rendered in a suit commenced against the alienor, grantor, or assignor, subsequent to the alienation, grant, or assignment; for the plain reason that otherwise his rights of property could be divested without his consent, and the fraud or laches of the grantor could work a forfeiture of estates he had created by the most solemn conveyances. Whatever may be the force and effect of the judgment or decree against the grantor, if it is sought to be used to the prejudice of the grantee, there must be independent, distinct evidence of the facts which authorized its rendition." (*Stone v. Stone*, 179 Mass. 555, 61 N. E. 268; *Hart v. Moulton*, 104 Wis. 349, 76 Am. St. Rep. 881, 80 N. W. 600; *Cypreanson v. Berge*, 112 Wis. 260, 87 N. W. 1081; *Coles v. Allen*, 64 Ala. 105; *Sorenson v. Sorenson* (Neb.), 98 N. W. 337.)

The judgment in *Toklas et al. v. Wirtz et al.*, having been rendered by a court which had no jurisdiction over the property situated in this state, became merely a judgment *in personam*, and was only binding upon those reached by personal service. (*Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. Rep. 165, 30 L. ed. 372; *Dull v. Blackman*, 169 U. S. 243, 18 Sup. Ct. Rep. 333, 42 L. ed. 733; *Pennoyer v. Neff*, 95 U. S. 723, 24 L. ed.

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565.) The plaintiff in the Washington court, appreciating this fact, dismissed his action as to Ford and all other defendants on whom he failed to get personal service. The "full faith and credit" commanded by section 1 of article IV of the federal constitution to be given by each state to the judicial proceedings of every other state does not mean that such proceedings shall be given any greater "faith and credit" in a sister state than they would be accorded in the state where taken. If the judgment of *Toklas et al. v. Wirtz et al.* had been rendered in this state and the interest claimed by Ford had been acquired subsequent to the entry of that judgment, or subsequent to the filing of a *lis pendens* in the proper office, then Ford would be a party privy to Wirtz, his grantor, and bound by the judgment. The judgment, we apprehend, would have had the same effect in Washington had the property been situated in that state. But when Ford secured his contract and entered into the possession of the premises no action was pending. After Wirtz had contracted to part with his title, he might have lost interest in defending a title which he had agreed to part with, and especially would this be true where but little remained due on the contract price and the grantor was thriftless and execution proof against any possible judgment for damages. In the latter case the law will not leave open so wide a door for fraud and injustice, but will allow the party acquiring such a property right his day in court to contest the claim on which a recovery is sought. The right acquired by Ford under his contract of July 27, 1897, became a property right; but under the contract for purchase, Ford did not become a party privy to an action subsequently instituted against his grantor and to which he was not made a party. There was no error in the conclusion reached by the trial judge, and the judgment will therefore be affirmed. Costs awarded to respondent.

Stockslager, C. J., and Sullivan, J., concur.

Points decided.

(March 13, 1905.)

WILLIAMSON v. MOORE.

[80 Pac. 227.]

(Two cases heard together.)

LIEN ON PERSONAL PROPERTY FOR CARE THEREOF—TENANTS IN COMMON OF PERSONAL PROPERTY—INJUNCTION PENDING DETERMINATION OF AN ACTION FOR DAMAGES.

1. One who renders services in the care and protection of personal property is, under the provisions of section 3445, Revised Statutes, as amended by act of February 9, 1899 (Sess. Laws 1899, p. 181), entitled to a lien on such property, dependent on possession, for his pay therefor.

2. Two of three tenants in common in possession of personal property may lawfully manage and control the same and their employment of another person to care for and protect the property will entitle such person to a lien thereon dependent on possession, for his pay for such services.

3. Where M. sells a tract of land to W. and others, and places a deed therefor in escrow and upon payment of the balance due on the escrow, M. refuses to surrender possession of the premises, the grantees are not thereby entitled to an injunction restraining M. from drawing the purchase money from the bank holding the escrow until the termination of an action for damages for unlawfully holding possession.

(Syllabus by the court.)

APPEAL from District Court in and for Blaine County. Honorable Lyttleton Price, Judge.

Action in ejectment for the possession of real property and to recover possession of certain personal property, and also suit for injunction restraining defendant from drawing certain money from the bank in which the same was deposited. Judgment for plaintiffs, from which defendant appeals. Injunction issued against defendant, and from an order refusing to dissolve the same, defendant also appeals. Affirmed in part and reversed in part.

The facts are stated in the opinion.

Argument for Appellant.

Sullivan & Sullivan, for Appellant.

Although a contract may not expressly say it is not transferable, yet if there are equivalent expressions or language which exclude the idea of performance by another, it is not assignable. (*La Rue v. Groezinger*, 84 Cal. 283, 284, 18 Am. St. Rep. 179, 24 Pac. 42.) The parties to a contract may in terms prohibit its assignment so that the assignees cannot succeed to any rights in virtue of it. (2 Am. & Eng. Ency. of Law, 1035.) Contracts which are entered into with a view to the confidence reposed in each other by the contracting parties, with the belief on one side and the other in the responsibility and solvency of the opposite party, are not assignable. (2 Am. & Eng. Ency. of Law, 1037, and authorities cited; *Arkansas Valley Smelting Co. v. Belden Min. Co.*, 127 U. S. 379, 8 Sup. Ct. Rep. 1308, 32 L. ed. 246.) An executory contract, made in view of the confidence reposed in one another by the parties thereto, is not assignable by one without the consent of the other. (*Boykin v. Campbell*, 9 Mo. App. 495.) Either cotenant may charge his separate interest, or may convey or mortgage it, or become personally liable upon an undertaking respecting it. (17 Am. & Eng. Ency. of Law, p. 673.) In general, the tenant in possession may use and manage the common property in any way he chooses, provided he does not injure his cotenants. (17 Am. & Eng. Ency. of Law, p. 670, and authorities cited.) In general, all acts done by one tenant for the protection or preservation of the common property, will inure to the benefit of all the cotenants, who in a proper case may be called upon for contribution for the expense incurred in proportion to their respective interests. (17 Am. & Eng. Ency. of Law, p. 671, and authorities cited; *Crary v. Campbell*, 24 Cal. 637, 638.) A tenant in common is entitled to charge his cotenant with a just proportion of the expenses incurred for the benefit of the common property. (*Peyton v. Smith*, 22 N. C. 325; *Hitchcock v. Skinner*, 1 Hoff. Ch. 21; *Anderson v. Greble*, 1 Ashm. 136; *Ruffners v. Lewis' Exrs.*, 7 Leigh, 720, 30 Am. Dec. 513.) The right of a tenant in common to the use and enjoyment of the common property exists not only in favor of the tenant himself but also in favor of a stranger claiming under him as lessee, licensee, or otherwise, so

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long as such possession and use do not interfere with the rights of the other cotenants. (17 Am. & Eng. Ency. of Law, p. 671; *Berthold v. Fox*, 13 Minn. 501, 97 Am. Dec. 243; *McGarrell v. Murphy*, 1 Hilt, 132; *Causee v. Anders*, 20 N. C. 388; *Ord v. Chester*, 18 Cal. 77; *Carpentier v. Small*, 35 Cal. 361, 362; *Lee Chuck v. Quan Chong & Co.*, 91 Cal. 593, 28 Pac. 45; *Hardy v. Johnson*, 68 U. S. 371, 17 L. ed. 502.) Defendant, in his cross-complaint, claims a special lien on said property under his contract of employment with Newland and Jensen. (Idaho Rev. Stats., sec. 3445; *Comstock Min. & Milling Co. v. Lundstrum*, 9 Idaho, 257, 74 Pac. 975.) An assignment, after the lien of a creditor has attached, as by filing a bill, etc., only conveys the property subject to that lien. (*Corning v. White*, 2 Paige, 567.) An assignee generally succeeds only to the rights of his assignor. (*Bullard v. Kinney*, 10 Cal. 60.) Generally, the assignee of a contract takes his assignor's rights, but subject to the same burdens. (*Smith v. Rogers*, 14 Ind. 224; *Phalen v. State*, 12 Gill & J. 18; *Kelley v. Schupp*, 60 Wis. 76, 18 N. W. 725.) Where it appears that the defendant is in possession of the property with the license or consent of the plaintiff's cotenant it is error to render judgment in favor of the plaintiff for restitution and possession of the whole property. All that he is entitled to is to be let into possession with the defendant to enjoy his moiety. (*Lee Chuck v. Quan Wo Chong & Co.*, 91 Cal. 593, 28 Pac. 45.) Section 4288, Revised Statutes, enumerates cases in which an injunction may be granted. The complaint filed does not come under any of the cases enumerated. It is necessary to allege facts. It is a well-settled rule of pleading that bare allegations of conclusions cannot avail the pleader, especially where a demurrer is interposed, without a statement of probative facts upon which the conclusions are based. (10 Ency. of Pl. & Pr., p. 925, and authorities cited.)

P. M. Bruner, for Respondent, cites no authorities.

AILSHIE, J.—On April 25, 1902, the defendant Moore entered into a contract with the plaintiffs Newland and Williamson and one Lars J. Jensen for the sale of a certain farm, together with livestock and farm implements thereon, situate in the

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county of Blaine, for the sum of \$2,050, and on that date the purchasers paid the sum of \$1,000, and the defendant executed a deed to the property and placed the same in the First National Bank at Hailey, in escrow. The escrow agreement accompanying the deed provided that the purchasers should pay the balance of \$1,050 into the First National Bank, with interest thereon at the rate of eight per cent per annum, which sum was to be paid on or before the twenty-fifth day of April, 1904. It is conceded by all parties to the action that the purchase price of \$2,050 was to be paid in full for both the ranch and the personal property, but no mention was made of the personalty in the deed, and no bill of sale appears to have been executed. But the escrow agreement contains the following reference to the personal property: "It is further mutually agreed that said second parties do not dispose of any stock on said land, consisting of one cow and six head of horses, until the land is paid for." The plaintiff Sherry was the agent and attorney in fact for the plaintiff Williamson in negotiating this purchase, and appears to have been the agent and attorney in fact for Williamson ever since that time. It was agreed between Moore, Newland and Jensen at the time of the transaction that Newland and Jensen should take immediate possession of the property, both real and personal, but it was specifically stipulated between them that Sherry should not be let into the possession of any of the property prior to making final payment. This agreement appears to have been made because of Moore's personal dislike for Sherry and his opinion as to Sherry's responsibility. In accordance with this agreement, Newland and Jensen entered into the possession of the property and continued in the possession and control of the same until September 3, 1902, on which date they entered into a written contract with Moore, by the terms of which Moore agreed to take possession of the ranch and personal property and to care for the same in a workmanlike manner so long as Jensen and Newland might desire, and which contract it was stipulated might be terminated at the option of Jensen and Newland, and in consideration thereof they promised and agreed to pay Moore the sum of \$45 per month for such services. Neither Williamson nor her agent, Sherry, were

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consulted about this transaction, nor did they take any part in the same; but Moore testifies that on the same day he notified Sherry of the contract which had been entered into between him and Jensen and Newland. Jensen and Newland appear to have left the country, but prior to leaving sold and assigned all their rights under the escrow agreement of April 25, 1902, to the plaintiff Sherry. Sherry demanded possession of the property from Moore, and Moore declined to surrender the possession until the balance of the purchase price was paid. This action was thereupon instituted against Moore in ejectment for the possession of the property and for damages for its detention.

The defendant answered and also filed a cross-complaint, in which he pleaded the agreement under which he took possession of the property and claimed a lien upon the property under the provisions of section 3445, Revised Statutes, as amended February 9, 1899 (Sess. Laws 1899, p. 181), and asked that his claim for taking care of and protecting the property at the rate of \$45 per month be ascertained and adjudged as a lien against such property. The case was tried to a jury and verdict was returned in favor of the plaintiffs for the possession of the property, both real and personal, without damages, and judgment was thereupon entered accordingly. A careful examination of the record in this case discloses no reason for our interfering with the judgment in ejectment for possession of the real property. We know of no principle of law by which, under the facts of this case, defendant Moore could acquire a lien upon the realty for either the care and protection of the real estate or personal property. On the other hand, under the provisions of section 3445, *supra*, and the authority of *Idaho Comstock M. & M. Co. v. Lundstrum*, 9 Idaho, 257, 74 Pac. 975, decided by this court, the defendant is entitled to a lien, dependent upon possession, on the personal property which had been intrusted to his care, keeping and protection under the agreement of September 3d, between himself and Newland and Jensen. The trial court refused to admit in evidence this contract between Moore, Jensen and Newland, apparently upon the theory that it had never been submitted to Mrs. Williamson or her agent, Sherry, for approval. But even had it been objectionable upon that ground,

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it would still have been admissible for the purpose of establishing the contract, and therefore attaching the lien against the interests held by Jensen and Newland at the time of its execution. But we think the agency in this case was sufficiently established and sufficient knowledge of the whole transaction was imparted to both Williamson and her agent, Sherry, as to bind the Williamson interest and make the contract admissible as against all the plaintiffs. The grantees were tenants in common, and the possession by one of such tenants of personal property was possession by all, and was sufficient to justify an exercise of the control and management assumed in this case. (17 Am. & Eng. Ency. of Law, 2d ed. 670; *Southworth v. Smith*, 27 Conn. 355, 71 Am. Dec. 72; *Tallman v. Barnes*, 54 Wis. 181, 11 N. W. 478.) It necessarily follows that one caring for such property under employment from the tenant in possession thereof is entitled to his lien under section 3445, *supra*.

After the commencement of the action in ejectment, and prior to the trial thereof, the plaintiffs Williamson and Sherry filed a further complaint against the defendant, setting up most of the facts contained in the first complaint, and the fact of the pendency of the action in ejectment, and that the plaintiffs were claiming damages against the defendant, and that defendant was wholly insolvent and unable to respond in damages, and that plaintiffs were about to pay into the First National Bank the balance of the purchase price under the escrow agreement of April 25th, and that the defendant was still retaining possession of the premises, and praying for an injunction against the defendant withdrawing the deed from the bank, or withdrawing the sum of \$900 of the purchase price which the plaintiffs were then about to pay into the bank, until the final determination of the action in ejectment. The court thereupon granted a temporary injunction. After the entry of judgment in the ejectment case, in which plaintiffs were not allowed any damages whatever, the defendant moved the court to dissolve the injunction previously issued against his withdrawing \$900 of the purchase price from the bank, and his motion was denied. From the order denying such motion, the defendant has also appealed, and both appeals have been heard together in this

Points decided.

court. Upon what theory the trial judge granted an injunction upon the complaint in this case we have been unable to discover. It was not within the province of a court of equity to restrain the defendant from drawing out of the bank the purchase price of his property pending the effort of the plaintiffs to secure a judgment against him for unliquidated damages. This was clearly an effort to hold money in such manner that it would be subject to execution for the payment of a prospective judgment. But the court refused to dissolve the injunction after the plaintiff had failed to obtain a judgment for damages. This was error.

Our conclusion from an examination of the whole record in this case is as follows: The orders granting the injunction and refusing to dissolve the same are hereby reversed. The judgment in ejectment for the possession of the real property described therein is affirmed, and that part of the judgment granting the plaintiffs possession of the personal property described therein is reversed. The cause is remanded to the trial court with direction to allow defendant's lien on the personal property and hear further evidence as to the amount due defendant if the parties desire to offer further evidence, and if they do not, to make finding upon the evidence already produced and enter judgment in harmony therewith and in accordance with the views herein expressed.

Costs awarded to appellant.

Stockslager, C. J., concurs.

(March 15, 1905.)

WILSON v. EAGLESON.

[81 Pac. 434.]

COMPLAINT SUFFICIENT WHEN.

1. A complaint in an action to restrain the maintenance of a checkgate in a community irrigating ditch or lateral that alleges the ownership or possession, use and cultivation of lands

Argument for Appellant.

under such ditch or lateral; that such ditch or lateral is their only means of water supply; that the maintenance of checkgates conflict with the legal rights of plaintiff and is unlawful—is not demurrable.

(Syllabus by the court.)

APPEAL from District Court of Ada County. Honorable George H. Stewart, Judge.

Action to restrain defendants from maintaining checkgates in ditch or lateral. Judgment for plaintiffs, from which defendants appeal. Affirmed.

Martin & McElroy, for Appellant.

Does the complaint state a cause of action? If this is to be regarded as an action to restrain a trespass on water, it must clearly appear what water is to be protected by the judgment of the court; and where, as in this case, the lower water users on the canal are enjoining those at the head of the canal, the relief granted will be that the defendant be required to permit the special quantity of water turned into the canal for plaintiffs to pass by his checkgates and sublaterals and go on down the canal for the use of plaintiffs. Unless plaintiffs allege the amount of water they claim or that is being turned into a ditch for their use, the court will be unable to grant relief, since defendant is entitled to his day in court as to the existence of the right sought to be protected. There is also no allegation that the plaintiffs, or either of them, own any specific interest in the lateral, or sufficient interest therein to carry any particular quantity of water. (*Bowman v. Ayers*, 2 Idaho, 306, 13 Pac. 346; *Jensen v. Hunter* (Cal.), 41 Pac. 16; *Yeager v. Woodruff*, 17 Utah, 361, 53 Pac. 1045.) Upon what theory can the court destroy the crops of defendants to help those of plaintiffs? The burden is always upon the one asking an injunction to show the greater equities, and if the equities are equal, the injunction will be denied. (16 Am. & Eng. Ency. of Law, 2d ed., p. 363, par. 8, and authorities cited; *Chartiers Block Coal Co. v. Mellon*, 152 Pa. St. 286, 34 Am. St. Rep. 645, 25 Atl. 597, 18 L. R. A. 702 (see p. 707); *Mott v. Underwood*, 148 N.

Argument for Respondents.

Y. 463, 51 Am. St. Rep. 711, 42 N. E. 1048, 32 L. R. A. 270 (see bottom last column, p. 272); *Fesler v. Brayton*, 145 Ind. 71, 44 N. E. 37, 32 L. R. A. 578.) In determining whether an injunction shall be granted or refused, the courts will always consider the injuries inflicted on others, strangers to the suit. (16 Am. & Eng. Ency. of Law, 2d ed., p. 364, and authorities cited.) Could the court in this case make an order for an injunction which shall in general terms restrain the defendants from in any manner interfering with any water belonging to the plaintiffs? We claim not: 1. For the reason that it is not shown in evidence that all of the plaintiffs have any right whatever; 2. For the reason that the relation of the plaintiffs and the defendants, in so far as their water rights are concerned, or the interest which they own or hold in the ditch, is not put in issue by the pleadings, and is not sufficiently shown in evidence, either to give the court jurisdiction, or to enable the court to justly determine the same, or to render a judgment thereon; 3. For the reason that such order is too indefinite and uncertain. The defendants or the plaintiffs can never tell with certainty whether it is being violated, and it will only lead to disputes and confusion. Injunction orders must be certain and specific. (*Lyon v. Botchford*, 25 Hun (N. Y.), 57; *Clark v. Clark*, 25 Barb. 76; High on Injunctions, sec. 884; *Ballentine v. Webb*, 84 Mich. 38, 47 N. W. 485, 11 L. R. A. 321; *Ellis v. Rademacher*, 125 Cal. 556, 58 Pac. 178, 180; *Robinson v. Clapp*, 65 Conn. 365, 32 Atl. 939, 29 L. R. A. 582, 592.)

Richards & Haga, for Respondents.

Every court of record has the inherent power to make rules for the transaction and regulation of its own business. (8 Am. & Eng. Ency. of Law, 2d ed., 29, and cases there cited; *Hanson v. McCune*, 43 Cal. 178.) Courts may rescind their rules, or may, in establishing them, reserve the exercise of discretion for particular cases; but a rule made without such qualifications must be applied to all cases that fall within it, until it is rescinded. (8 Am. & Eng. Ency. of Law, 2d ed., 31, and note 3; *Thompson v. Hatch*, 3 Pick. (Mass.) 512; *Treishel v. McGill*, 28 Ill. App. 68.) If an appeal be attempted and be not

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perfected in accordance with all the conditions thus prescribed, whether by statute or rule, the court does not become vested with complete jurisdiction of the case for the purpose of review, and the abortive appeal will be dismissed. (2 Spelling on New Trial and Appeal, sec. 646.) This court has repeatedly held, where the transcript fails to show compliance with the statutes or rules of the court in the matter of appeals, that the appeal will be dismissed. The requirement that the transcript must be filed within sixty days after the appeal is perfected is mandatory, and has been enforced wherever the matter has been called to the attention of the court. (*Pence v. Lemp*, 4 Idaho, 527, 43 Pac. 75; *Taylor v. McCormick*, 8 Idaho, 37, 66 Pac. 805; *Penny v. Nez Perce County*, 4 Idaho, 642, 43 Pac. 570; *Fahey v. Belcher*, 3 Idaho, 355, 29 Pac. 112; *Mahoney v. Marshall*, 3 Idaho, 343, 29 Pac. 110; *Hattabaugh v. Vollmer*, 5 Idaho, 23, 46 Pac. 831.) We desire first to call the court's attention to the fact that most, if not all, of the questions raised by the appellants on their appeal were before this court and were passed upon by this court in the former appeal. (See *Wilson v. Eagleson*, 9 Idaho, 17, 71 Pac. 613.) The principle of *res judicata*, therefore, confronts the appellants on the present appeal. This court in a recent decision of *Hall v. Blackman*, 9 Idaho, 555, 75 Pac. 608, in discussing the question of effect of a former appeal, says: "There must necessarily be an end to litigation in any given case, but that object can never be attained if an appellate court can re-examine upon subsequent appeals the same questions which it has previously examined, and the fact that it may have made a mistake or committed an error will not warrant a re-examination and reconsideration upon another appeal in the same case. (*Lindsay v. People*, 1 Idaho, 438; *Board of Supervisors of Wayne Co. v. Kinnicott*, 94 U. S. 498, 24 L. ed. 260; *Aurora v. West*, 7 Wall. 82, 19 L. ed. 42; *Washington etc. Co. v. Sickles*, 24 How. 333, 16 L. ed. 653; *Wilkes v. Davies*, 8 Wash. 112, 35 Pac. 611, 23 L. R. A. 103; *Guarantee Co. of N. A. v. Phoenix Ins. Co.*, 124 Fed. 170.) Under statutes identical with ours the courts of other states have repeatedly held that "an appeal from the judgment does not present the evidence for review, unless error is assigned

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in the overruling of the motion for a new trial.” (*Pierce v. Manning*, 2 S. Dak. 517, 51 N. W. 332; *United States v. Trabing*, 3 Wyo. 147, 6 Pac. 721; *Hawkins v. Hubbard*, 2 S. Dak. 633, 51 N. W. 774; *First Nat. Bank v. Comfort*, 4 Dak. 167-173, 28 N. W. 855; *Myers v. Longstaff*, 14 S. Dak. 98, 84 N. W. 233; *Boyd v. Bryan*, 11 Okla. 56, 65 Pac. 940; *Withers v. Kemper*, *supra*; *Borgensen v. Cookstone*, 91 Minn. 91, 97 N. W. 734; *McNabb v. Northern P. R. Co.*, 12 N. Dak. 568, 98 N. W. 353; *Glaser v. Glaser*, 13 Okla. 389, 74 Pac. 944; *Rice v. Inskeep*, 34 Cal. 224.) The questions presented for review by an appeal from the judgment are of an entirely different character from those presented by an appeal from an order granting or denying a new trial. (*Holmes v. Warren*, 145 Cal. 457, 78 Pac. 954; *Toulouse v. Burkett*, 2 Idaho, 184, 10 Pac. 26.) A comparison of the findings with the complaint will show that the court found affirmatively on every issue raised by the complaint, and as the complaint had already been held sufficient, the lower court was certainly justified in making its findings in accordance with the allegations of the complaint. Two or three findings of fact have been placed among the conclusions of law, but this does not in any way impair the force of such findings. (*Miller v. Smith*, 7 Idaho, 204, 61 Pac. 824; *McCarthy v. Brown*, 113 Cal. 15, 45 Pac. 14; *Cushing v. Cable*, 54 Minn. 6, 55 N. W. 736.) “When the material issues are passed upon, it is not cause for reversal that an ultimate fact is placed with the conclusions of law, as it is difficult many times to distinguish between an ultimate fact and a conclusion of law.” It is well-settled that ownership is an ultimate fact, and not a conclusion of law. (*Johnson v. Vance*, 86 Cal. 128, 24 Pac. 863; *Souter v. Maguire*, 78 Cal. 543, 21 Pac. 183; 21 Ency. of Pl. & Pr. 718; 12 Ency. of Pl. & Pr. 1044, 1045.) Findings are to be read and considered together and liberally construed in support of the judgment, and, if possible, are to be reconciled so as to prevent any conflict upon material points. (*People's Home Sav. Bank v. Rickard*, 139 Cal. 285, 73 Pac. 858; *Breeze v. Brooks*, 97 Cal. 77, 31 Pac. 742, 22 L. R. A. 256.)

STOCKSLAGER, C. J.—This is the second appeal in this case. A full statement of the facts, together with the demands

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of the respective parties to this action, may be found in 9 Idaho, 17, 71 Pac. 613. In that hearing the sufficiency of the complaint and the undertaking upon which the restraining order was issued by the district court were before this court for determination. The opinion was filed February 2, 1903. It is shown by the records in this appeal that after the hearing in that case the plaintiffs filed an amended complaint, in which they set out a full description of the real estate owned by the respective parties plaintiffs to the action. An answer was filed to the original complaint, the substance of which will be found in the opinion reported in 9 Idaho, 17, 71 Pac. 613. A demurrer was filed to the amended complaint, to wit, that facts sufficient to constitute a cause of action in favor of said plaintiffs and against these defendants are not set out and alleged in said amended complaint. Also for the reason that it does not appear by said amended complaint what interest, estate or title, if any, plaintiffs, or either of them, own in what is described in said amended complaint as the Peninger lateral, and for the further reason that it does not appear what amount of water, if any, the said plaintiffs, or either of them, are entitled to divert from the New York canal. This demurrer was overruled and thereafter defendants answered denying that plaintiffs, or either of them, own any interest in the Peninger lateral or the right to the use of any water flowing through it, except as hereinafter admitted. Deny that said lateral was constructed or being maintained by the joint efforts of plaintiffs and defendants, or was at any time used by them for the irrigation of their lands, except as hereinafter admitted. Deny that lateral is a community ditch. Aver that the records of Ada county do not show that H. G. Wilson and A. H. Wilson were the owners of the land described in the complaint, and defendants have no information or belief on this subject sufficient to answer said allegation, and upon such ground deny that at the commencement of this action said plaintiffs, or either of them, were the owners of any of said tracts of land. On information and belief deny that plaintiff A. H. Bishop was the owner of the tract of land alleged in the complaint, and deny that J. L. Horton was the lessee or tenant of said Bishop. Upon information

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and belief, "deny that at the commencement of this action, plaintiffs H. G. Wilson and A. H. Wilson and John R. Kennedy, or either of them, had placed under cultivation any portion of the said tract of land of which he is alleged to be the owner, or that the same or any part thereof was in a high state of cultivation, or had any crops growing thereon, or that any part thereof was depending on Peninger lateral. . . . Deny that the land alleged to have been owned by A. T. Thomas and leased by James M. Hyatt is or was at the commencement of this action irrigated from the Peninger lateral, . . . and aver that water for such purpose was and is delivered above said checkgates is absolutely necessary to the diversion of said water." The answer then avers: "That at all times herein mentioned defendant, A. H. Eagleson has been and still is the owner and in possession of certain lands, describing them, and that the checkgates mentioned in the complaint herein are situated wholly on the land of this defendant. That said Peninger lateral was originally constructed from said headgate to said checkgate in the winter of 1900 and 1901, and completed in the year 1901, at which time these defendants constructed the headgates complained of herein, and that none of said plaintiffs, with the exception of George Peninger, assisted in the construction of said canal. Admits that plaintiffs Peninger and Elliott, have carried small quantities of water through said lateral for the purpose of irrigating, amounting to about fifty inches, but the defendants allege that the same has been done under an oral license only, and subject to the rights of the defendants as herein alleged to use and maintain said lateral and said checkgates for the purpose of carrying water to the lands of defendants for the purpose of irrigation.

"That at all times since the construction of said lateral defendants have been the sole owners of that portion extending from the headgates to and across said lands of defendants, including the checkgates in controversy. Admit that some of the defendants at and prior to the commencement of this action were endeavoring to use said Peninger lateral to carry water for the purpose of irrigation, but defendants allege that except as herein admitted they have never granted to the plaintiffs, or

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either of them, the right so to do, nor have said parties, or either of them, secured or attempted to secure any interest in said lateral or any right to use the same, and deny that they or any of them had any right to use said lateral for such purpose; and defendants further allege that at no time have they ever permitted the use of said lateral by the said plaintiffs, or either of them, in any manner adverse or hostile to the use thereof by defendants, and the maintenance therein by these defendants of a checkgate at the point where the checkgate in controversy is situated, or in any manner except as herein stated; and defendants further allege that said checkgate has been at all times maintained by them since the construction of said lateral, with such additional changes as were made necessary by the enlargement or other changes in said lateral."

Then follows an allegation: "That the New York Canal Company, Limited, is the owner of the New York canal, and a large quantity of water diverted thereby from Boise river, and Peninger lateral is a lateral of said canal.

"That defendants are the owners of all of section 20, except east half of southeast quarter thereof, and are the owners of water rights for three hundred inches from said New York canal, . . . which water is delivered to defendants through said Peninger lateral by means of three sublaterals belonging to defendants. That in an action in the district court of Ada county in June, 1902, between the New York Canal Company, Limited, and the Ada County Farmers' Irrigation Company, it was decreed that the New York Canal Company should divert three hundred and twenty inches of water into the Peninger lateral for the use of these defendants; . . . that such water was diverted by these defendants by means of said checkgates for use upon their said land; . . . that said checkgate is of the character commonly used for such purpose, and is necessary and proper, . . . and unless defendants are permitted to maintain the same they will be prevented from diverting and carrying their said water and using their said property, to wit, the Peninger lateral, and will be unable to irrigate the lands belonging to them and irrigated by means of said lateral."

It is then averred: "That the checkgate was constructed by de-

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defendants at the same time with the original construction of the Peninger lateral, and as a part thereof, and has been continuously used and maintained by defendants. That said checkgate does not permit the water belonging to plaintiffs, or either of them, from flowing through said lateral, and that the maintenance thereof by defendants does not, and will not, interfere with the use of said lateral by anyone entitled thereto, and has not, and will not, cause the destruction of crops of plaintiffs." Then follows a denial that the crops of plaintiffs, or any of them, have been or will be injured by maintaining the checkgates in their present condition.

It will be observed from the pleadings in the case that there is no attempt on the part of the respondents to settle title to real estate; neither do they ask for the settlement of the water rights between themselves and the appellants. It is simply a question of the right of the defendants to maintain certain checkgates in the lateral from which all are dependent for water for use in the irrigation of their crops. It is insisted by learned counsel for respondents that this court has passed upon all the material questions involved in this appeal upon the former appeal heretofore referred to. Whilst the court did not say in so many words in that case that the complaint was sufficient, by inference it did say as much, as an objection was raised in that case to the sufficiency of the complaint to support the order made by the trial court which was the basis for the appeal, and the action of the lower court was sustained. We are of the opinion that the amended complaint now before us for consideration was sufficient for the full determination of all questions it was intended to have determined between the plaintiffs and defendants in the lower court, and that the demurrer was properly overruled.

It is urged by counsel for respondents that most, if not all, the questions now before the court on this appeal were before this court and passed upon in the former appeal, and have therefore become the law of the case. The record seems to uphold them in this contention. It is shown that the order appealed from now is practically the same as the one involved in that appeal. To say the least, both appeals are taken from orders

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of the district court or judge thereof, restraining and prohibiting the defendants from maintaining checkgates in the Peninger lateral that will interfere with the flow of water in such lateral past the lands of the defendants and to the lands of the plaintiffs. The language may not be literally the same, but the object and purpose is unquestionably the same. The entire controversy on both hearings, so far as the record shows, involved the right of the defendants in the court below to maintain the checkgates in the Peninger lateral, the defendants there insisting that they could not successfully irrigate their lands without the use of the checkgates, and that their rights were superior in all respects to the rights of any of the plaintiffs; hence, if the plaintiffs, or any of them, were injured, they must suffer the consequences. On the other hand, the plaintiffs insisted that they were entitled to the use of a certain quantity of water to be delivered to them from the New York Canal Company through the Peninger lateral, their lands lying below the lands of the defendants, and along the lands of said Peninger lateral, and that said water could not be so delivered if the defendants were permitted to maintain the checkgates in controversy.

Judging from the elaborate record in both hearings, all parties to the controversy were given a full and complete hearing by the learned judge in the court below, and on the first hearing he granted a temporary restraining order restraining the defendants from maintaining the checkgates above a certain elevation, to wit: "Fourteen inches from the floor of such checkgate, as now situated, and not less than sixty inches in width between the interior of the side walls of said checkgate." This order was made after a large number of affidavits were filed in support of and in opposition to the maintenance of such checkgates. Thereafter, and on the final trial of said cause, the court made the order now under consideration, to wit: "And it is further ordered, adjudged and decreed that the permanent injunction of this court issue herein, directed to said defendants, their servants, . . . requiring them, and each of them, to perpetually refrain from having or maintaining any artificial obstruction, and particularly the said checkgate, in any way

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or to any extent, that may or can interfere with the waters of the plaintiffs flowing in said Peninger lateral, as turned into such lateral to them, and each of them by the New York Canal Company, and that the plaintiffs have judgment for their costs."

Upon the last hearing we find that a large quantity of oral evidence was introduced, the witnesses for both plaintiff and defendants being examined and cross-examined at length in some instances, and we think properly. The court took upon itself the responsibility of asking questions, evidently with a view of arriving at the true facts in the case.

After such full and complete hearing the court made findings:

1. That the plaintiffs, together with defendants herein, constructed in the years 1900 and 1901 the lateral described in plaintiff's complaint and known as the Peninger lateral, and have since maintained the same at the joint expense and for the joint use of plaintiffs and defendants.
2. That such lateral was constructed to be used as a community lateral, and has ever since been maintained as such for carrying water from what is known as the New York canal to the lands of the plaintiff, to be used in irrigating such lands.
3. That the plaintiffs, except J. H. Horton and James M. Hyatt, who are lessees, are each owners of land under and tributary to such lateral.
4. That such lands are desert in character.
5. That the said lateral is the only convenient means by which water can be carried from said New York canal to and upon said tracts of land.
6. That much of plaintiff's land has been placed in cultivation, and requires the application of water for the preservation and cultivation of the crops thereon.
7. That defendants have constructed and are maintaining a checkgate in such lateral in a manner that prevents plaintiffs from procuring a free flow of water from said New York canal through such lateral, necessary to preserve and cultivate such crops.
8. That said defendants, though often requested to move such obstruction, have refused so to do, and threaten to continue such checkgates, and will do so unless restrained by an order of this court.
9. That should such checkgate be so maintained, plaintiffs' crops will be injured and destroyed, and plaintiffs' right to the use of such water through such lateral will be infringed upon, and the crops

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of plaintiffs are of such a character that the injury thereto cannot be justly estimated in damages. 10. That A. H. Eagleson is the owner of the land described in his answer, and that the checkgate is upon such land. 11. That none of the plaintiffs are carrying water through said lateral under an oral license, subject to the rights of the defendants, or any of them. 12. That on the ninth day of June, 1902, this court by an alternative writ of mandate, required the New York Canal Company, Limited, to deliver three hundred inches of water to defendants at the head of the Peninger lateral, which writ was subsequently made permanent, and the said New York Canal Company, Limited, both prior and subsequent to the commencement of this action, turned water into said Peninger lateral for plaintiffs and defendants in bulk, without segregating or measuring out a certain or definite quantity for each or any of them. 13. That said checkgate is of the character commonly used in irrigating canals for diverting water into laterals and sublaterals, but when said Peninger lateral is not carrying water to its full capacity, said checkgate materially obstructs the flow of water to plaintiffs and each of them. 14. That during the irrigating season of 1902, defendants had not less than one hundred and forty acres of land in cultivation dependent on water from the Peninger lateral, and when there is only a small flow of water in said lateral said land cannot be fully or satisfactorily irrigated, except by means of a checkgate. 15. That said checkgate as maintained at the time of the commencement of this action, was constructed about the 1st of May, 1902, but a smaller checkgate was maintained at the same place by said defendants during the irrigating season of 1901. 16. That said checkgate prevents the water belonging to said plaintiffs and turned into said lateral for plaintiffs from flowing freely through said lateral, and the maintenance of said checkgate by the defendants does and will interfere with the use of said lateral by the plaintiffs and each of them, and will cause destruction of their crops and irreparable injury to plaintiffs.

The conclusions of law are: 1. That plaintiffs each own the right to convey water through what is called the Peninger lateral described in the complaint herein for the purposes of irrigation.

Points decided.

2. That such lateral is owned in common by plaintiffs and defendants. 3. That the defendants wrongfully maintain a checkgate in such lateral in a manner that interferes with the rights of the plaintiffs, and each of them, in the use of said lateral, and that such acts on the part of the defendants will wrongfully deprive plaintiffs of their rights to the use of such lateral. 4. That the defendants should be perpetually restrained from in any manner maintaining such checkgate, in any way or to any extent that the same may or will interfere with the waters of the plaintiffs flowing through such lateral as turned into such lateral for the plaintiffs by the New York Canal Company.

Much has been said by counsel in their briefs for appellants as well as respondents, and many authorities cited, relative to the power and duty of this court to examine and pass upon the evidence in appeals from judgments where such appeal has been taken within sixty days from the date of its rendition, and a statement as if on motion for new trial has been settled and allowed. We do not feel called upon to pass upon this question on this appeal, for the reason that we have carefully examined the evidence as disclosed by the record and are fully satisfied that the findings and conclusions of the lower court were fully sustained by the evidence. The judgment is affirmed, with costs to respondents.

Ailshie, J., and Sullivan, J., concur in conclusion reached.

ON REHEARING.

(July 5, 1905.)

WILSON v. EAGLESON.

[81 Pac. 437.]

INJUNCTION—UNCERTAINTY OF DECREE OR JUDGMENT—INDEFINITENESS.

1. Judgment held sufficiently certain to warrant the issuance of an injunction.

(Syllabus by the court.)

APPEAL from District Court of the Third Judicial District, in and for Ada County. Honorable George H. Stewart, Judge.

Action to restrain defendants from diverting water from a certain lateral. Judgment for plaintiffs. Affirmed.

Opinion of the Court—Sullivan, J., on Rehearing.

Hugh E. McElroy and Frank Martin, for Appellants.

Richards & Haga, for Respondents.

SULLIVAN, J.—This case was first before this court at its January, 1903, term (9 Idaho, 17, 71 Pac. 613). It was again before the court at its November, 1904, term, and was decided March 15, 1905. A rehearing was thereafter granted, and the case was again argued to this court at its May, 1905, term, and on such hearing it was contended that the findings were not sufficient to sustain the judgment. The facts of the case are quite fully stated in the decision as reported in 71 Pac. *supra*, and require no further statement here. The real contention is whether the decree is so indefinite and uncertain that it is not susceptible of enforcement, so far as the granting of a perpetual injunction is concerned. Said decree is as follows:

“Wherefore, it is ordered, adjudged and decreed that the defendants, and each of them, their servants, agents, employees and lessees, be perpetually enjoined and restrained from in any wise maintaining any artificial obstruction, and particularly the checkgate mentioned in the complaint and in controversy herein, in any way or to any extent that may or can interfere with the waters of the plaintiffs flowing in said Peninger lateral, as turned into said lateral to them, and each of them, by the New York Canal Company. And it is further ordered, adjudged and decreed that the permanent injunction of this court issue herein, directed to said defendants, their servants, agents, attorneys and lessees, requiring them, and each of them, to perpetually refrain from having or maintaining any artificial obstruction, and particularly the said checkgate, in any way or to any extent, that may or can interfere with the waters of the plaintiffs flowing in said Peninger lateral, as turned into such lateral to them and each of them by the New York Canal Company.”

It is contended by counsel for appellant that the court found that the appellants were using the ditch in question to carry their own water to be used upon their own land, and that they were diverting the same from a lateral by precisely the same means used by respondents to take the water from the same

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ditch which the court finds was a checkgate of a character commonly used in irrigating canals for diverting water into laterals and sublaterals.

It is contended that there is nowhere found by the court the amount or quantity of water that the respondents are entitled to run through said lateral; that as the quantity of water the respondents are entitled to run through said lateral has not been found and determined, the appellants are unable to determine the amount of water to be permitted to pass said checkgate; that the appellants are entitled to three hundred inches of water, and that if the New York Canal Company only turn that amount into said lateral for the appellants, and none whatever for the respondents, that they are entitled to take that amount of water out of said lateral and maintain such a checkgate therein as to accomplish that purpose. That in case the appellants are cited for contempt for the violation of said decree, it would necessitate a retrial of the whole case and a determination of the amount of water that each party is entitled to, and for that reason the decree is too indefinite and uncertain to warrant the issuance of any injunction thereon.

The appellants are only enjoined by said judgment from obstructing the flow of any water turned into said lateral for respondents, or either of them, by said canal company. In case more is turned for them it cannot be obstructed, and if any water, no matter what quantity, up to the limit of the quantity entitled to be run through said ditch by respondents is turned in for them, appellants are enjoined from obstructing its flow. Each of the parties have the right to flow water through said lateral, and if water is turned therein for appellants only, they are not in contempt of court under said injunction if they take it out, and if water is turned in for both appellants and respondents, appellants have the right to divert from said lateral water turned in for them, but in so doing they must not obstruct the flow of water turned therein for respondents, each having a right to flow water through said lateral; they must do so without injury to the others.

We think the judgment sufficiently definite to inform the appellants that they must not obstruct the flow of water turned

Points decided.

into said lateral for respondents, and it does not prevent appellants from running their own water through the same and diverting it therefrom by checkgate, or any other means that does not prevent the water belonging to respondents from flowing to them.

The judgment is affirmed, with costs in favor of respondents.

Stockslager, C. J., and Ailshie, J., concur.

(March 15, 1905.)

OREGON SHORT LINE RAILROAD COMPANY v. QUIGLEY.

[80 Pac. 401.]

RAILROAD RIGHT OF WAY—ACT OF CONGRESS GRANTING SAME—WHEN GRANT VESTS—PUBLIC LANDS—OF WHAT CONSIST—POWER OF CONGRESS OVER SAME IS ABSOLUTE—ESTOPPEL BY DEED NOT APPLICABLE TO GRANTEE—ADVERSE POSSESSION AND STATUTE OF LIMITATIONS—WHEN PLEA NOT AVAILABLE.

1. The power of Congress over the public lands is plenary so long as title thereto remains in the government, and no right of property therein has vested in another.

2. No right of property, as against the government, vests in a settler on public lands until he has complied with all the prerequisites for acquiring title and paid the purchase money.

3. Act of Congress of March 3, 1873, granting a right of way to the Utah and Northern Railway Company, and requiring the filing of a map of definite location with the Secretary of the Interior, is substantially complied with, so far as settlers are concerned; by the actual construction and operation of the road.

4. *Id.*—The grant for right of way became definitely fixed by the actual construction of the road as effectually as it could have been by the filing of a map of location.

5. The grant by Congress of a right of way one hundred feet wide on each side of the central line of the track was a conclusive determination of the reasonable and necessary quantity of land to be dedicated to such use, and carried with it the right of possession to the whole of such grant.

Statement of Facts.

6. As a general rule of law, the grantee named in a deed of conveyance is not estopped to deny the title of his grantor.

7. *Id.*—The estoppel exists only where there is an obligation to restore the possession in some event or upon some contingency.

8. The grant by Congress of a right of way is not an absolute fee for all purposes, but is in the nature of a conditional grant and limited to use and occupation for railway purposes. The franchise and right of way are inseparably attached to each other.

9. *Id.*—The company could not by its grant convey any part of the right of way in such manner or for such purpose as would sever the right of possession from the franchise to operate and maintain a railway line thereon.

10. *Id.*—It therefore follows that adverse possession cannot ripen into a right which would divert the use and occupation of such right of way from that to which Congress made the dedication.

11. The statute of limitations will not run against an action to maintain the integrity of the right of way granted by Congress for a specific use and purpose.

(Syllabus by the court.)

APPEAL from District Court in and for Bannock County.
Honorable Alfred Budge, Judge.

STATEMENT OF FACTS.

The plaintiff commenced this action in the lower court against the defendant to quiet its title to a right of way two hundred feet wide across two adjoining tracts of land of one hundred and sixty acres each, which were originally settled upon by Joseph Hendricks and Andrew Quigley, respectively. The plaintiff, the Oregon Short Line Railroad Company, is the grantee and successor to the Utah and Northern Railway Company. On March 3, 1873, an act of Congress was approved granting a right of way to the Utah and Northern Railway Company over the public lands in the territories of Montana, Utah and Idaho, which act is as follows:

“An Act Granting the Right of Way Through the Public Lands to the Utah and Northern Railroad Company.

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That

Statement of Facts.

for the purpose of enabling the Utah and Northern Railroad Company, a corporation organized under the laws of the territory of Utah to build and extend its line by way of Bear river valley, Soda Springs, Snake river valley, and through Montana Territory to a connection with the Northern Pacific Railroad, by the most advantageous and practicable line, to be selected by said company, the right of way through the public lands in the territory of Utah, Idaho, and Montana is hereby granted to said company. Said right of way hereby granted to said company is to be the extent of one hundred feet in width on each side of the central line of said road where it may pass over the public lands. There is also hereby granted to said company all necessary ground, not to exceed twenty acres for each ten miles in length of the main line of said railroad, for station buildings, workshops, depots, machine-shops, switches, sidetracks, turntables and water stations. And whenever it may be necessary to use material from the public lands for the construction of said road, it may be done; but no private property shall be taken for the use of said company, except in the manner now provided by section three of an act entitled, 'An act to amend an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the government the use of the same for postal, military and other purposes," approved July first, eighteen hundred and sixty-two,' approved July second, eighteen hundred and sixty-seven.

"Sec. 2. That said company shall be authorized and empowered to mortgage, in the usual manner, their franchise, roadbed, and all property belonging to said company, to an amount not to exceed fifteen thousand dollars per mile for the entire length of said road, upon such terms as may seem to them best; and upon said mortgage may issue mortgage bonds, not to exceed the same amount per mile; but in no case shall the United States be liable in any way whatever for anything done by said company.

"Sec. 3. That the rights herein granted shall not preclude the construction of other roads through any canyon, defile, or pass on the route of said road.

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"Sec. 4. That the said railroad company shall locate the route of said railroad and file a map of such location within one year in the office of the Secretary of the Interior; and shall complete its railroad within ten years after the passage of this act; and nothing herein contained shall be construed as recognizing or denying the authority of the legislature of Utah Territory to create railroad corporations.

"Sec. 5. The Congress reserves to itself the right to alter, amend, or repeal this act whenever in its judgment the interests of the people may require it."

In 1875, and after the lands in dispute had been surveyed and were open to sale and settlement, Quigley and Hendricks each located on a one hundred and sixty acre tract of land, and continued with their families to occupy their respective lands until they thereafter acquired patents from the government. In 1878 the Utah and Northern Railway Company decided to build their road by way of Marsh valley, Portneuf river and Snake river valley, instead of over the originally planned route by way of Soda Springs and Snake river valley. In the course of the construction of the road and during the spring of '78, they came to the claims occupied by Quigley and Hendricks, and in order to immediately construct over the lands so occupied, the railway company, on May 28th, through its trustee, Jay Gould, purchased from Quigley and Hendricks a right of way sixty feet wide across their respective possessory claims, and took from each a quitclaim deed, and at the same time took contracts from each wherein they agreed to execute to the railway company warranty deeds for such right of way upon receiving patent therefor from the government. The road was immediately constructed across these tracts of land and was completed and in operation prior to the 20th of June following. On June 20, 1878, and after the construction and completion of the road, Congress passed an additional and supplemental act to that of March 3, 1873, granting to the Utah and Northern Railway Company the right of way over the public lands by way of Marsh valley, Portneuf river and Snake river valley, which act is as follows:

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"An Act Creating the Utah and Northern Railway Company, a Corporation, in the Territories of Utah, Idaho, and Montana, and Granting the Right of Way to Said Company Through the Public Lands.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way through the public lands of the United States and other privileges heretofore granted by law to the Utah and Northern Railroad Company, are hereby modified and regranted so as to enable the Utah and Northern Railway Company and its assigns to build their road by way of Marsh valley, Portneuf river and Snake river valley instead of by the way of Soda Springs and Snake river valley, as originally granted.

"Sec. 2. And said company is hereby made a railroad corporation in the territories of Utah, Idaho, and Montana, under the same conditions and limitations and with the same rights and privileges that it now has and enjoys under its articles of incorporation. Provided, that said corporation shall at all times hereafter be subject to all the laws and regulations in relation to railroads of the United States or of any territory or state through which it may pass. And suits against said corporation may be instituted in the courts of said territories or either of them having jurisdiction by the laws of such territory.

"Sec. 3. Congress may at any time add to, alter, amend or repeal this act."

No further transactions appear to have taken place between the railway company and Quigley and Hendricks or their successors in interest, since the approval of the act of Congress of June 20, 1878. In the meanwhile the railway company have maintained and operated the road, and it is agreed that the company has used and occupied all of such right of way necessary or needful for its purposes during that time, and that the same has never at any time exceeded the sixty-six feet originally granted by quitclaim deed to Gould. No warranty deed has ever been given by Quigley and Hendricks, and does not appear to have ever been demanded by the railway company. On December 7, 1878, Quigley filed a homestead on his one

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hundred and sixty acre tract and received a final land office certificate for the same on October 6, 1882; and thereafter received patent. Hendricks filed on his one hundred and sixty acre tract on December 31, 1880, and received patent therefor December 23, 1882. In 1881 the railway company constructed fences along their right of way and across these tracts of land, the fences on each side of the track being thirty-three feet from the center of the track. The company did not file its map of location until May, 1881—some three years after the completion of the road. Quigley and Hendricks, their grantees and successors, have cultivated the lands on each side of the track continuously ever since the construction of the road up to within thirty-three feet of the center of the track. This action was commenced by the plaintiff to quiet its title to the full right of way of two hundred feet wide as granted by the act of Congress. The case was heard upon an agreed statement of facts and the statement of facts was accepted and adopted by the court as his findings of fact, and upon such findings he drew his conclusions of law, which are as follows:

1. "That the rights of the plaintiff under its grant from the United States did not attach to the lands in question until after the rights of the defendants had accrued."

2. "That the plaintiff is estopped to assert or claim any rights in or to the lands in question, except the right of way thirty-three (33) feet in width upon each side of the center line of its roadbed as now located and used, being the right of way inclosed by the plaintiff with its fence."

3. "That the rights of the defendants, except as far as the same have been conveyed to the plaintiff, are superior to the rights of the plaintiff in and to the lands in question."

4. "That the defendants should recover their costs in this action."

And judgment is ordered accordingly.

Judgment was entered for defendants from which plaintiff appealed. Reversed.

The facts are stated in the opinion.

Argument for Respondent.

P. L. Williams and F. S. Dietrich, for Appellant.

Nearly, if not all, authorities cited in appellant's brief are found and commented on in the opinion.

Standrod & Terrell, for Respondent.

It may be conceded that the lands of the respondents, on the twentieth day of June, 1878, as between their predecessors and the United States, were public lands, and continued to be public lands until the respective entries of Quigley and Hendricks, December 7, 1878, and December 31, 1880. After said dates of entry the lands so entered were no longer public lands of the United States. (*Bardon v. Northern Pac. R. R. Co.*, 145 U. S. 535, 12 Sup. Ct. Rep. 856, 36 L. ed. 808; *Hastings & D. R. R. Co. v. Whitney*, 132 U. S. 357-361, 10 Sup. Ct. Rep. 112, 33 L. ed. 364; *Leavenworth R. R. Co. v. United States*, 92 U. S. 733, 23 L. ed. 634; *Witherspoon v. Duncan*, 4 Wall. (U. S.) 210-218, 18 L. ed. 339.) And therefore, on the tenth day of May, 1881, when the predecessor of appellant filed in the office of the Secretary of the Interior its map of definite location of its route, the lands described in the complaint were not public lands, and not subject to the definite location of the appellant's map, nor to the grant of June 20, 1878, which, until the time of definite location as provided by said act, was a mere float. Counsel for the appellant takes comfort in the fact that the act of June 20, 1878, is a grant *in praesenti*. Upon this question we call attention to the reasoning and the language of the supreme court of the United States, in the case of *St. Paul etc. R. R. Co. v. Northern Pac. R. R. Co.*, 139 U. S. 1-5, 35 L. ed. 77. (*United States v. Oregon Cent. R. Co.*, 176 U. S. 28-43, 20 Sup. Ct. Rep. 261, 44 L. ed. 358; *Mennotti v. Dillon*, 167 U. S. 703-720, 17 Sup. Ct. Rep. 945, 42 L. ed. 333; *Northern Pac. R. R. Co. v. Sanders*, 166 U. S. 620-632, 634, 636, 17 Sup. Ct. Rep. 671, 41 L. ed. 1139; *United States v. Northern Pac. R. R. Co.*, 152 U. S. 284-296, 298, 14 Sup. Ct. Rep. 598, 38 L. ed. 443; *Railroad Co. v. Baldwin*, 103 U. S. 426, 26 L. ed. 578; *Leavenworth etc. R. R. Co. v. United States*, 92 U. S. 733, 23 L. ed. 634; *Nelson v. Northern Pac. R. R. Co.*, 188 U. S. 108, 23 Sup. Ct. Rep. 306, 47 L. ed. 406.) We

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concede that appellant is entitled to a right of way sixty-six feet wide not because of the grant claimed, but by reason of the quitclaim deed from respondents for that amount and possession under it, by which respondents would be forever estopped, and we contend that the estoppel would be mutual. We think the general rule is well settled, both upon reason and authority, that the grant of public lands to a railroad, as a bonus or for right of way, is not operative until after the filing of the map of definite location, and then only as to such lands of the public domain as are undisposed of for other purposes under other laws. The grant operates upon only such lands as are subject to the grant (not otherwise disposed of), and the title to such lands as are identified by the map relates back to the date of the grant. (*Northern Pac. R. R. Co. v. Sanders*, 166 U. S. 620, 17 Sup. Ct. Rep. 671, 41 L. ed. 1139; *Van Wyck v. Knevals*, 106 U. S. 360, 1 Sup. Ct. Rep. 336, 27 L. ed. 201; *United States v. Oregon Cent. Pac. R. R. Co.*, 176 U. S. 28, 20 Sup. Ct. Rep. 261, 44 L. ed. 358; *Clements v. Warner*, 24 How. 394-397, 16 L. ed. 695; *Ard v. Brandon*, 156 U. S. 537, 15 Sup. Ct. Rep. 406, 39 L. ed. 524; *Nelson v. Northern Pac. R. R. Co.*, 188 U. S. 108, 23 Sup. Ct. Rep. 307, 47 L. ed. 406.) But counsel for appellant contend that the railroad in question, being actually located and built along a certain route, superseded the necessity of filing a map as required by the acts of Congress granting the right of way, and cite in support of their contention the case of *Jamestown etc. R. R. Co. v. Jones*, 177 U. S. 125, 20 Sup. Ct. Rep. 568, 44 L. ed. 698. The rule is well settled that statutory grants of property, franchises or privileges in which the government has no interest are to be strictly construed in favor of the public and against the grantee, and nothing will pass except what is granted in clear and explicit terms. (*Black's Interpretation of Laws*, p. 316; *Coo-saw Min. Co. v. South Carolina*, 144 U. S. 550, 12 Sup. Ct. Rep. 689, 36 L. ed. 537; *Holyoke Co. v. Lyman*, 15 Wall. (U. S.) 512, 21 L. ed. 137; *Slidell v. Grandjean*, 111 U. S. 412-438, 8 Sup. Ct. Rep. 475, 28 L. ed. 321; *Stein v. Bienville Water Co.*, 141 U. S. 67-80, 11 Sup. Ct. Rep. 892, 35 L. ed. 622; *Fertilizer Co. v. Hyde Park*, 97 U. S. 666, 24 L. ed. 1038; *Central Trust Co. v. Pullman C. Co.*, 139 U. S. 24-49, 11 Sup.

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Ct. Rep. 478, 35 L. ed. 55.) The rule that a grant by the United States is strictly construed against the grantee applies as well to grants to a state in aid in building railroads as to one granting special privileges to a private corporation. (Black's Interpretation of Laws, pp. 210, 211, 316; *Leavenworth L. & G. Co. v. United States*, 92 U. S. 733, 23 L. ed. 634; *Thomas v. Mahan*, 4 Me. 513; *United Society v. Eagle Bank*, 7 Conn. 456.) Under this state of facts, we contend that the appellant did not accept the grant of Congress for a right of way over these particular lands, but prior to the date of that act acquired and accepted its right and title from another source, which would forever estop appellant from accepting or having any benefits from the grant as to these particular lands. Their title to the right of way through these lands rests, not upon the grant, but upon the fee conveyed by the United States to Quigley and Hendricks, and by them conveyed by their quitclaim deed to appellant's grantors. Where a vendee goes into possession under a contract of purchase with the consent of the vendor, it is a general rule that, while he remains in peaceable and undisturbed possession under the contract, he is estopped from disputing the title of the vendor, or setting up an outstanding title in a third party or an adverse title in himself, to defeat the same. (11 Am. & Eng. Ency. of Law, 2d ed., p. 444; *Potts v. Coleman*, 67 Ala. 221; *Munford v. Pearce*, 70 Ala. 452; *Lewis v. Boskin*, 27 Ark. 64; *Sanford v. Cloud*, 17 Fla. 557; *Beall v. Davenport*, 48 Ga. 165, 15 Am. Rep. 656; *Harle v. McCoy*, 7 J. J. Marsh. (Ky.) 318, 23 Am. Dec. 407; *Towne v. Butterfield*, 97 Mass. 105; *Pershing v. Canfield*, 70 Mo. 140; *Harvey v. Morris*, 63 Mo. 475; *Ingraham v. Baldwin*, 9 N. Y. 45; *Wilkins v. Suttles*, 114 N. C. 550, 19 S. E. 606; *Lacy v. Johnson*, 58 Wis. 414, 17 N. W. 246; *McIndoe v. Morman*, 26 Wis. 588, 7 Am. Rep. 96; *Herman on Estoppel*, sec. 234; *Smith v. Knowles*, 2 Grant Cas. (Pa.) 413; *Lewis v. Castleman*, 27 Tex. 407; *Wright v. Douglas*, 7 N. Y. 564; *Cohoes Co. v. Gross*, 13 Barb. 137; *Moore v. Fitzwater*, 2 Rand. 442; *Fitch v. Baldwin*, 17 Johns. (N. Y.) 161; *Beebe v. Swartwout*, 3 Gilm. 162; *Furness v. Williams*, 11 Ill. 229.) The supreme court of this state has passed

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upon this question against the contention of appellant, in the case of *Idaho Land Co. v. Parsons*, 3 Idaho, 450, 31 Pac. 791, from which we quote the following syllabus: "When coterminous owners of land establish a boundary line, and take possession to the line so agreed upon, and one of them erects valuable improvements thereon, and holds quiet and peaceable possession thereof without objection from the other coterminous owner or his grantees, for a period of more than eight years, such line is binding upon them and those holding under them." See, also, supporting the same rule the following cases: *Cavanaugh v. Jackson*, 91 Cal. 583, 27 Pac. 931; *White v. Spreckels*, 75 Cal. 610, 15 Pac. 715; *Cooper v. Vierra*, 59 Cal. 282; *Sneed v. Osborn*, 25 Cal. 619; *Helm v. Wilson*, 76 Cal. 485, 18 Pac. 604; *Blair v. Smith*, 16 Mo. 273; *Orr v. Hadley*, 36 N. H. 575; *Houston v. Sneed*, 15 Tex. 307; *Fisher v. Bennchoff*, 121 Ill. 435, 13 N. E. 150. Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them. "A court of equity," says Lord Camden, "has always refused its aid to stale demands, where the party slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced; and therefore from the beginning of this jurisdiction there was always a limitation to suits in equity in this court." (*Speidel v. Henrici*, 120 U. S. 377-387, 7 Sup. Ct. Rep. 610, 30 L. ed. 718; *Penn Mut. Life Ins. Co. v. Austin*, 168 U. S. 685, 18 Sup. Ct. Rep. 223, 42 L. ed. 627; *Galliter v. Cadwell*, 145 U. S. 368-371, 12 Sup. Ct. Rep. 873, 36 L. ed. 738; *Hammond v. Hopkins*, 143 U. S. 224-250, 12 Sup. Ct. Rep. 418, 36 L. ed. 134; *Williard v. Wood*, 164 U. S. 502-524, 17 Sup. Ct. Rep. 176, 41 L. ed. 531; *Sullivan v. Portland & K. R. R. Co.*, 94 U. S. 806-811, 24 L. ed. 324; *Lansdale v. Smith*, 106 U. S. 391-394, 1 Sup. Ct. Rep. 350, 27 L. ed. 219; *Whitney v. Fox*, 166 U. S. 637-648, 17 Sup. Ct. Rep. 713, 41 L. ed. 1145; *Abraham v. Ordway*, 158 U. S. 416-423, 15 Sup. Ct. Rep. 894, 39 L. ed. 1136;

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Foster v. Mansfield R. R. Co., 146 U. S. 88-102, 13 Sup. Ct. Rep. 28, 36 L. ed. 899; *Townsend v. Vanderwerker*, 160 U. S. 171, 16 Sup. Ct. Rep. 258; *Gildersleeve v. New Mexico Min. Co.*, 161 U. S. 573, 16 Sup. Ct. Rep. 663, 40 L. ed. 812; *Alsop v. Riker*, 155 U. S. 461, 15 Sup. Ct. Rep. 162, 39 L. ed. 223.) Delay in the assertion of a right, unless satisfactorily explained, even when it does not constitute a positive statutory bar, operates in equity as evidence of assent, acquiescence or waiver. (*Chezum v. McBride*, 21 Wash. 558, 58 Pac. 1067-1069; *Mullen's Admrs. v. Carper*, 37 W. Va. 215, 16 S. E. 527; *Parker v. Dacres*, 130 U. S. 43, 9 Sup. Ct. Rep. 433, 32 L. ed. 848; *Richards v. Mackall*, 124 U. S. 183, 8 Sup. Ct. Rep. 437, 31 L. ed. 396; *Horr v. Franch*, 99 Iowa, 73, 68 N. W. 581; *Bryant v. Groves*, 42 W. Va. 10, 24 S. E. 605.) We are aware of the general rule that the owner of the legal title who is in possession may lie by until his possession is invaded or his title attacked, before taking steps to vindicate his rights, but when the party claiming is out of possession, then the defense of laches is always available. (*Conklin v. Wehrman*, 38 Fed. 874; *Hermanns v. Fanning*, 151 Mass. 1, 23 N. E. 493; *Birdsall v. Johnson*, 44 Mich. 134, 6 N. W. 226; *Hatch v. Village of St. Joseph*, 68 Mich. 220, 36 N. W. 36; *Bausman v. Kelley*, 33 Minn. 197, 8 Am. St. Rep. 661, 36 N. W. 333; *Haskins v. Wallet*, 63 Tex. 213; *Rudland v. Mastic*, 77 Fed. 688.) If a party claiming to have an equitable title to lands is out of possession, his equitable right will be barred if he fails to take steps within a reasonable time to establish it, unless he can show an actual hindrance or impediment caused by fraud or concealment of the party in possession. (*Hall v. Law*, 102 U. S. 461, 26 L. ed. 217; *Speidel v. Henrici*, 120 U. S. 377, 7 Sup. Ct. Rep. 610, 30 L. ed. 718; *Underwood v. Dugan*, 24 Fed. 74; *Comer v. Comer*, 119 Ill. 170, 8 N. E. 796; *Ross v. Payson*, 160 Ill. 349, 43 N. E. 399; *Weiss v. Bethel*, 8 Or. 522; *Hines v. Thorn*, 57 Tex. 98; *Taylor v. Whitney*, 56 Minn. 386, 57 N. W. 937.)

AILSHIE, J. (After Making Statement of Facts.)—The first question presented for our consideration is: Were the lands in dispute, on June 20, 1878, public lands of the United States

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over which Congress had the power to make such disposition as it saw fit by legislative grant? In this connection it should be remembered that up to that date the settlers, Quigley and Hendricks had performed no act by which to initiate an inchoate right except that of settlement upon the lands. The power of Congress over the public lands is plenary so long as title thereto remains in the government and no right of property therein has vested in another. (*Northern Pac. R. R. Co. v. Smith*, 171 U. S. 268, 18 Sup. Ct. Rep. 794, 43 L. ed. 160; *Norton v. Evans*, 82 Fed. 806, 27 C. C. A. 168; *Frisbie v. Whitney*, 9 Wall. 187, 19 L. ed. 668; *The Yosemite Valley Case*, 15 Wall. 77, 21 L. ed. 82; *Campbell v. Wade*, 132 U. S. 34, 10 Sup. Ct. Rep. 9, 33 L. ed. 240; *Buxton v. Traver*, 130 U. S. 232, 9 Sup. Ct. Rep. 509, 32 L. ed. 920.)

It appears to have been uniformly held by the federal courts that an entry in the proper land office does not create any vested right in the entrymen as against the United States, and that Congress may by subsequent legislation dispose of the land to anyone, notwithstanding such entry. (*King v. M'Andrews*, 111 Fed. 871, 50 C. C. A. 29; *Norton v. Evans*, *supra*; *Northern Pac. R. R. Co. v. Smith*, *supra*; *Frisbie v. Whitney*, 9 Wall. 187-196, 19 L. ed. 668; *Wagstaff v. Collins*, 97 Fed. 3, 38 C. C. A. 19; *Campbell v. Wade*, *supra*; *Shiver v. United States*, 159 U. S. 491, 16 Sup. Ct. Rep. 54, 40 L. ed. 231; *Southern Pac. Co. v. Burr*, 86 Cal. 279, 24 Pac. 1032.) In the light of these authorities there is no room for doubt but that Congress had unrestricted power of disposition over these lands on June 20, 1878.

Of course, while it is the rule that no vested right is acquired as against the United States until all the prerequisites for acquirement of title have been complied with, it still remains true that parties may as against each other acquire a preference right to take title to the public lands, and in all such cases the first in time is first in right. (*Ard v. Brandon*, 156 U. S. 537, 15 Sup. Ct. Rep. 406, 39 L. ed. 526; *Northern Pac. R. R. Co. v. Colburn*, 164 U. S. 383, 17 Sup. Ct. Rep. 98, 41 L. ed. 480; *Frisbie v. Whitney*, *supra*; *The Yosemite Valley Case*, *supra*.)

In the consideration of this question it should be borne in

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mind that the line of authorities holding that the lands which have been settled upon with a view to pre-emption or homestead are no longer public lands, are cases arising over land grants in aid of the construction of roads or indemnity lands therefor, and not over rights of way. In those grants, Congress has in most, if not all, cases limited the right of the railroad company to such lands as have not been occupied by bona fide settlers, or to which no homestead rights have attached or been initiated. (*Nelson v. Northern Pac. R. R. Co.*, 188 U. S. 108, 23 Sup. Ct. Rep. 302, 47 L. ed. 406.) And the courts have held in such cases that the right of the settler might be initiated at any time prior to the filing the map of definite location, or, as held in some cases, the actual construction of the road. No such reservation or exception, however, appears to have been made in any of the acts granting rights of way alone. (*St. Joseph etc. R. R. Co. v. Baldwin*, 103 U. S. 426, 26 L. ed. 578.)

It is next urged by respondents that no right vested in the railway company upon the passage and approval of the act, but that the vesting of title to the right of way was dependent upon the filing of a map of definite location as provided by section 4 of the act of March 3, 1873. There could be only two purposes served by the filing of the map under the provisions of this section; the one for the information of the government and its land office officials to apprise them of the occupation and disposition of the public lands belonging to the government; the other purpose for the information of settlers and purchasers who desire to acquire rights in such public lands. In this case the government is not complaining of such failure, and it does not appear upon what theory a settler can be heard to complain of the failure to perform an act by another which is solely for the information and benefit of the government. If, on the other hand, such failure has deprived the individual of any of his rights or hindered him in the acquisition of any interest which he might otherwise have acquired, then he would certainly have a right to urge such objection. In this case the railroad was actually constructed over the land, and was being operated at the date of the passage of the act of June 20, 1878, and constituted actual, rather than constructive, notice to Quig-

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ley and Hendricks, and all the rest of the world, as to the exact location of this right of way. By the actual location of the track upon the ground they were saved the necessity of consulting records and files of the land office in order to ascertain the definite location of such road. The road having been constructed prior to the passage of the act, the filing thereafter of a map of definite location could serve no one except the government.

In *Jamestown etc. R. R. Co. v. Jones*, 177 U. S. 125, 20 Sup. Ct. Rep. 568, 44 L. ed. 700, it was held that the grant of a right of way to the plaintiff which required the filing of such maps with the Secretary of the Interior was complied with, so far as the settler was concerned, upon the actual construction of the road, and that the entry of the defendant was subject thereto.

The grant for right of way became definitely fixed by the actual construction of the road as effectually as it could have been by the filing of a map of location. It ceased to be a floating grant as soon as the road was constructed, and no one could thereafter be misled as to the exact situs of the right of way. Every person thereafter acquiring title to any of the public lands through which this line of road was then constructed, took the same subject to the right of way granted by the act of June 20, 1878. (*St. Joseph etc. R. R. Co. v. Baldwin*, 103 U. S. 426, 26 L. ed. 579; *Bybee v. Oregon etc. R. R. Co.*, 139 U. S. 663, 11 Sup. Ct. Rep. 641, 35 L. ed. 309; *Doran v. Central P. R. R. Co.*, 24 Cal. 246.)

It is also contended in this case that notwithstanding the grant of the two hundred foot right of way, the railroad company cannot take a decree quieting title to more than it occupies and uses, or is actually necessary for the use for which the grant was made. We do not think this position can be sustained. Under these grants, the question of the reasonable amount of land necessary for such use is not open to consideration and determination by the courts. The grant by Congress to the Utah and Northern Railway Company of a right of way one hundred feet on each side of the central line of its track was a conclusive determination of the reasonable and neces-

sary quantity of land to be dedicated to such use, and carried with it the right of possession in the grantee therein named and its successor. (*Northern Pac. R. R. Co. v. Smith, supra; Southern Pac. Co. v. Burr, supra; New Mexico v. United States Trust Co.*, 172 U. S. 171, 19 Sup. Ct. Rep. 128, 43 L. ed. 412.)

Respondents have devoted much space in their briefs to the contention that the appellant's predecessor in interest, Gould, having taken deeds from Quigley and Hendricks to a sixty-six foot right of way, is therefore estopped at this time to deny the grantor's right or title. At the time the deed was executed it only conveyed to the grantee, Gould, the right of possession, for the reason that neither party had, or claimed to have, at that time any right or title in the property, other than a right of possession at sufferance of the government. Neither party having any title, Quigley and Hendricks, being in possession, could maintain such possession as against Gould and the railroad company until such time as the latter might acquire a better right and title from the owner of the fee. Under the deed the grantee took a perpetual right of way so far as the grantor was able to convey, and the grantee was placed under no obligations to acknowledge his grantor as landlord, or ever at any time restore to him the possession so acquired.

As a general proposition of law, the grantee named in a deed of conveyance does not hold in privity with his grantor, but rather holds adversely to the grantor, and is not estopped to deny the title of his grantor. (*Bybee v. Oregon etc. R. R. Co., supra; Merryman v. Bourne*, 9 Wall. 592, 19 L. ed. 683; *Robertson v. Pickrell*, 109 U. S. 608, 3 Sup. Ct. Rep. 407, 27 L. ed. 1049; 11 Am. & Eng. Ency. of Law, 2d ed., 400, 440; 3 Washburn on Real Property, 6th ed., sec. 1914; *Schuler v. Ford, ante*, p. 739, 80 Pac. 219.) To this rule, as to most all other general rules, there are exceptions, but no reason has been called to our attention why this case should come under any of the exceptions to the general rule and the doctrine of estoppel be applied to the grantee named in the general deed of conveyance. The grantors have lost nothing by the transaction, nor have they been prejudiced in any of their rights or lulled to repose by any act of the grantee. On the contrary, they have

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profited by the transaction to the extent of the purchase price, which they received for the execution of the quitclaim deeds.

It is finally argued by respondent that this action is barred by the statute of limitations, in that the defendants and their predecessors in interest have been in the adverse possession of the whole of this right of way, except the sixty-six feet granted by their quitclaim deed, for the period of twenty-seven years last past, and that the plaintiff is therefore barred from the prosecution of the action. It is also claimed that in addition to the defense of the bar of the statute, that the plaintiff is guilty of such laches in the assertion of his claim that he can no longer be heard in a court of equity. While the defendants and their predecessors have been in the actual possession of the premises, and continued to cultivate the same, still the case does not present all the facts going to constitute adverse possession. But as we read the authorities, there are potent reasons why the bar of the statute and the plea of adverse possession cannot prevail in a case of this kind. This grant by Congress of a right of way is not an absolute fee for all purposes, but is in the nature of a conditional grant, and limited to use and occupation by the grantee and its successors and assigns for the purposes of maintaining and operating a railroad. The franchise and the right of way in such case are inseparably attached to each other while in the possession and under the control and management of the grantee and its successors. The company could not by its grant convey any part of its right of way in any manner that would sever the right of possession from the franchise to operate and maintain a railway line thereover. (*Northern Pac. R. R. Co. v. Townsend*, 190 U. S. 267, 23 Sup. Ct. Rep. 671, 47 L. ed. 1044; *East Alabama R. Co. v. Doe*, 114 U. S. 340, 5 Sup. Ct. Rep. 869, 29 L. ed. 136; *Yellow River Improvement Co. v. Wood County*, 81 Wis. 554, 51 N. W. 1004, 17 L. R. A. 92; *In re Canada Southern Ry. Co.*, 20 Am. & Eng. R. R. Cas. 196; *Union Pac. Ry. Co. v. Kindred*, 43 Kan. 134, 23 Pac. 112; *East Tennessee etc. G. R. Co. v. Telford's Exrs.*, 89 Tenn. 293, 14 S. W. 776, 10 L. R. A. 855; *Northern Pac. R. R. Co. v. City of Spokane*, 56 Fed. 917.) And if it could not do so by its solemn grant it certainly could not do so by any act which might be con-

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strued into a recognition of adverse possession. It must follow that the statute of limitations does not run in such cases against an action to maintain the integrity of such a right of way. (*Southern Pac. R. R. Co. v. Hyatt*, 132 Cal. 240, 64 Pac. 272, 54 L. R. A. 522.)

The contention that the plaintiff has mistaken its remedy and that an action to quiet title will not lie in a case like this, is answered by this court adversely to respondent in *Johnson v. Hurst*, ante, p. 308, 77 Pac. 791; *Shields v. Johnson*, ante, p. 576, 79 Pac. 391; *Fry v. Summers*, 4 Idaho, 424, 3 Pac. 1118. It follows, therefore, from what has been said, that the judgment of the trial court must be reversed, and it is so ordered, and the cause is remanded, with directions to make and file conclusions of law in harmony with the views herein expressed, and enter judgment in accordance therewith. Costs awarded to appellant.

Stockslager, C. J., and Sullivan, J., concur.

(May 8, 1905.)

CALIFORNIA CONSOLIDATED MINING COMPANY v.
MANLEY.

[81 Pac. 50.]

FRAUDULENT CONVEYANCE—WANT OF CONSIDERATION—INTENT TO
HINDER, DELAY OR DEFRAUD CREDITORS—NOTICE TO CORPORATION—
NECESSARY PARTIES DEFENDANT.

1. Where K. takes a deed from McA. to all his interest in a mining claim, which is all the property McA. has in this state, for a consideration of one dollar and "other good and valuable consideration," which latter consideration is not explained, and at the time of such transfer K. has notice that his grantor is heavily indebted in this state and has avoided personal service of process and has allowed a judgment *in rem* entered against him for over \$50,000, and has been trying to buy up such claims at one-fifth their face value, and that he is not meeting his obligations in due course of business, and that he has no other property in the state out of which such indebtedness can be made, and during the meanwhile

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K. had occupied a close confidential relation with McA.—under such circumstances, *held*, that K. cannot restrain an execution sale of such property to pay creditors on the theory that he is an innocent purchaser for a valuable consideration.

2. The intent with which a transfer in fraud of creditors is made is not established so much by attempting to ascertain the *actual* intent in the mind of the debtor, but rather by the facts and circumstances under which the transfer was made and from which the law imputes a fraudulent motive.

3. A conveyance made for a mere nominal consideration when attacked as fraudulent will be subjected to the same rules applicable to voluntary transfers.

4. Notice to a person who was the promotor in the organization of a corporation, a principal incorporator and who is manager and resident director is such notice to the corporation that it cannot avail itself of the protection of law to which an innocent purchaser is entitled.

5. Where C. Co. seeks to restrain an execution sale on the grounds that it is an innocent purchaser for a valuable consideration, and K. is brought in as a defendant and files a cross-complaint to set aside the sale to C. Co. as fraudulent, the fraudulent grantors are not necessary parties.

(Syllabus by the court.)

APPEAL from District Court in and for Shoshone County.
Honorable Ralph T. Morgan, Judge.

Plaintiff commenced an action against Charles Manley as sheriff of Shoshone county, to restrain him from making a sale of the California Lode Mining Claim on execution. A. G. Kerns, receiver of the property of the Coeur d'Alene Bank, an insolvent corporation, was brought in by an order of court and answered and filed a cross-complaint, alleging that the transfer to plaintiff was fraudulent and void, and made to hinder, delay and defraud creditors. The court found for the plaintiff and entered his decree perpetually enjoining the sale. Defendants appealed. Reversed.

W. W. Woods and H. S. Gregory, for Appellants. John P. Gray and J. H. Forney, of Counsel.

The contention of the appellants in this case is, that at the time McAulay conveyed the thirteen-sixteenths of the California

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lode to Keane, he did so for nominal consideration, viz., the consideration of \$1, and that the conveyance so made was with the intent to hinder, delay and defraud creditors of said McAulay. It is contended by respondent that it is an innocent purchaser and entitled to protection in equity. This proposition we controvert. To constitute one a *bona fide* purchaser, he must have actually paid the purchase price before he received notice of the facts. (*Wood v. Raburn*, 18 Or. 3, 22 Pac. 521.) Whenever the agent, acting in the scope of his duties, for his principal, receives notice in a matter in which he represents the principal, such notice is notice to the principal. The test is whether the information was of a character which it was the duty of the agent to communicate; if so, it binds the principal. (Wharton on Agency, sec. 178; *Whitney v. Burr*, 115 Ill. 289, 3 N. E. 434.) If the conveyance of the bulk of the personal property necessarily results in delaying creditors, the conveyance is a legal fraud, though no specific intent to defraud exists. (*Wells v. Schuster*, 23 Colo. 534, 48 Pac. 809.) It was urged by respondent in the court below, that Keane and McAulay were necessary parties to appellants' cross-complaint. We insist that neither of them were either necessary or proper parties thereto. (*Blanc v. Paymaster M. Co.*, 95 Cal. 524, 29 Am. St. Rep. 149, 30 Pac. 765.) The cross-complaint is proper in the action to quiet title when it seeks to enforce an equitable title against the plaintiff as the holder of the legal title. (*Winter v. McMillan*, 87 Cal. 256, 25 Pac. 407.) The debtor is not a necessary party where he has parted with the property. (*Samaingo v. Stiles* (Ariz.), 20 Pac. 607; *Huneke v. Dold*, 7 N. Mex. 5, 32 Pac. 45.) In no event is McAulay or is Keane a necessary party to this suit. A voluntary conveyance is good as between the parties thereto. (*Bunn v. Winthrop*, 1 Johns. Ch. 329; *Jones v. Jones*, 6 Conn. 111, 16 Am. Dec. 35.) An absolute deed containing a warranty of title, and purporting to be made for valuable consideration, is valid as between the parties, though made for the purpose of defrauding creditors. (*Parrot v. Baker*, 82 Ga. 364, 9 S. E. 1068.) A conveyance made without consideration is void as to existing creditors, regardless of intent; as to subsequent creditors, it is void only when made to hinder, delay

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or defraud them. (*Boatman Sav. Bank v. Overall*, 90 Mo. 410, 3 S. W. 64; *Lionberger v. Baker*, 88 Mo. 447; *Millington v. Hill*, 47 Ark. 301, 1 S. W. 547; *Eigenbrun v. Smith*, 89 N. C. 207; *Romands v. Maddux*, 77 Iowa, 203, 41 N. W. 763.) To avoid a sale for valuable consideration, actual notice to the purchaser of the fraudulent intent of the vendor is not necessary. No purchaser has a right to remain willfully ignorant of facts within his reach. (*Dyer v. Taylor*, 50 Ark. 314, 7 S. W. 258; *Gilliland v. Fenn*, 90 Ala. 230, 8 South. 15, 9 L. R. A. 413; *Tillman v. Heller*, 78 Tex. 597, 22 Am. St. Rep. 77, 14 S. W. 700, 11 L. R. A. 628; *Hawley v. Smeiding*, 3 Kan. App. 159, 42 Pac. 841; *Schnavely v. Bishop*, 8 Kan. App. 667, 55 Pac. 667; *Chapman v. Hughes*, 134 Cal. 641, 58 Pac. 298, confirmed on rehearing, 60 Pac. 974; 66 Pac. 982; *Richard v. Snyder*, 11 Or. 501, 6 Pac. 186; *Davis v. Ward*, 109 Cal. 186, 50 Am. St. Rep. 29, 41 Pac. 1010; *Jewett v. Palmer*, 7 Johns. Ch. 68, 11 Am. Dec. 401.) Lord Hardwick early announced the rule in our equity jurisprudence that even innocent purchasers could only invoke the protection of the court to the extent that they were "hurt," but Mr. Keane, in this case, strenuously refused to state, at any time, the amount to which he was "hurt" over and above \$1, the consideration placed in the deed, and the only reasonable and intelligent inference to be drawn from all the facts and circumstances, as shown by the record in this case, is that, at all the times mentioned therein, the said Keane was not only the trustee, but the confidential agent of the said McAulay, and held this property as trustee for McAulay, burdened with the payment of the indebtedness of the Coeur d'Alene Bank as represented by the receiver herein. (*Rudy v. Austin*, 56 Ark. 76, 35 Am. St. Rep. 85, 19 S. W. 111; *Hagerman v. Buchanan*, 45 N. J. Eq. 292, 17 Atl. 946, 14 Am. St. Rep. 739, also extended note to the same; *Davis v. Ward*, 109 Cal. 186, 50 Am. St. Rep. 29, 41 Pac. 1010.) Warvelle lays down the following rule in determining the question of fraud: "It is further said that fraud should be so inferred when the facts and circumstances are such as to lead a reasonable man to the conclusion that an attempt has been made to withdraw the property of the debtor from the reach of his creditors with intent to prevent them

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from recovering their just debts; and that, if *prima facie* such fraudulent attempt is thus established, it may be regarded as conclusive, unless it is rebutted by facts and circumstances which are proven." (Warvelle on Vendors, secs. 601, 619, 636; *Severs v. Dodson*, 53 N. J. Eq. 633, 51 Am. St. Rep. 641, 34 Atl. 7; *Kaine v. Weigley*, 22 Pa. St. 179; *Clements v. Nicholson*, 6 Wall. 299, 18 L. ed. 786; *Jewett v. Palmer*, 7 Johns. Ch. 68, 11 Am. Dec. 401; *Batavia v. Wallace*, 102 Fed. 243, 42 C. C. A. 310; *Zimmer v. Miller*, 64 Md. 296, 1 Atl. 858.) A conveyance by a debtor during the pendency of a suit against him is a badge of fraud. (*Venable v. United States*, 2 Pet. 112; *Callan v. Statham*, 23 How. 477, 16 L. ed. 532; Warvelle on Vendors, secs. 609, 611; *Lane v. Starkey*, 15 Neb. 285, 18 N. W. 47; *Bowyer v. Martin*, 27 W. Va. 442; *Clements v. Moore*, 6 Wall. 299, 18 L. ed. 786; *Thompson v. Baker*, 141 U. S. 648, 12 Sup. Ct. Rep. 89, 35 L. ed. 889; *Fuller Electrical Co. v. Lewis*, 101 N. Y. 675, 5 N. E. 437; *Mobile Sav. Bank v. McDonald*, 89 Ala. 434, 18 Am. St. Rep. 137, 8 South. 137, 9 L. R. A. 645; *Brady v. Linehan*, 5 Idaho, 732, 51 Pac. 761.) A court of equity will not interpose by injunction to prevent a sale of complainant's real estate under execution against another, since the question of title to real estate is ordinarily to be determined at law and a mere trespass will not be enjoined unless the legal remedy is inadequate; nor will the aid of an injunction be extended in behalf of one claiming under a fictitious or fraudulent sale from a judgment debtor made with the intent to prevent his creditors from reaching the property to restrain a sale of the property thus transferred under execution against the debtor. (1 High on Injunctions, 120; *Wilson v. Hyatt*, 4 S. C. 369; *Mora v. Avery*, 22 La. Ann. 417; *Lewis v. Drinkgrave*, 24 La. Ann. 489; 2 High on Injunctions, sec. 1550.)

A. H. Featherstone and Charles P. Lund, for Respondent.

This court has frequently decided that where findings of fact are made and judgment entered thereon, no exception being taken, the only question for consideration by the supreme court is whether the complaint states facts sufficient to warrant the judgment. (*Diehl v. Hull*, 1 Idaho, 352; *Goodman v. Minear*,

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1 Idaho, 128; 8 Ency. of Pl. & Pr. 274.) An exception is an objection on a matter of law to a decision made either before or after judgment by a court, tribunal, judge, or other judicial officer in an action or proceeding. (Idaho Rev. Stats., sec. 4426.) The code requires findings of fact and conclusions of law, in an action tried before the court, to be separately stated and judgment rendered accordingly. (Rev. Stats., sec. 4407.) Even though it be claimed that the exception allowed by the court shows that objection was made, such exception is clearly insufficient. A general exception is not available if any one of the findings are unobjectionable. (*Allen v. Hutchinson*, 45 Wis. 259; *Neely v. Democratic Pub. Co.*, 12 Wash. 659, 41 Pac. 173; *Irwin v. Olympia Waterworks Co.*, 12 Wash. 112, 40 Pac. 637; *Washington Liquor Co. v. Northwest Livestock Co.*, 18 Wash. 71, 50 Pac. 569; *Thomas v. Mitchell*, 27 Wis. 414; 1 Spelling on Appellate Practice, p. 592, sec. 330.) The exception should specify wherein the findings are erroneous. (8 Ency. of Pl. & Pr. 274.) The court is powerless to inquire into the matters set up in the cross-complaint, because McAulay and Keane are not made parties, and were not before the court. Where a creditor's bill assails a deed either for the purpose of having it rectified or vacated, the parties to the deed are necessary parties to the suit, and without such parties no valid decree can be passed. (Bigelow on Fraud, 458; *Ward v. Hollins*, 14 Md. 158; *Gaylords v. Kelshaw*, 1 Wall. (U. S.) 81, 68 L. ed. 612; *Smith v. Shaffer*, 29 Neb. 656, 45 N. W. 936.) The reason for the rule is well stated in the cases of *Spear v. Campbell*, 5 Ill. (4 Scam.) 424; *Williams v. Friedman*, 4 Idaho, 209, 95 Am. St. Rep. 59, 38 Pac. 937. The new matter which it is proper for the defendant to introduce into a pending litigation, by means of a cross-bill, is such, and such only, as it is necessary for the court to have before it in deciding the questions raised in the original suit to enable the court to do full and complete justice to all the parties before it, in respect to the cause of action on which the complainant rests his right to aid or relief. If the defendant, in bringing his cross-bill, attempts to go beyond this, and to introduce new and distinct matter not essential to the proper determination of the matter put in litigation by the original bill,

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although he may show a perfect case against either the complainant or one or more of his codefendants, his pleading will not be a cross-bill, but an original bill, and no decree can be rendered on such matter. (5 Ency. of Pl. & Pr. 64; *Andrews v. Kibbee*, 12 Mich. 94, 83 Am. Dec. 766; *Farmers' Bank etc. v. Bronsen*, 14 Mich. 361; *Krueger v. Ferry*, 41 N. J. Eq. 438, 5 Atl. 452; *Griffith v. Merritt*, 19 N. Y. 529; *Chicago etc. Ry. Co. v. Bank*, 134 U. S. 276, 10 Sup. Ct. Rep. 550, 33 L. ed. 900; *O'Neill v. Perryman*, 102 Ala. 522, 14 South. 898; *McMullen v. Ritchie*, 57 Fed. 104; *Ayres v. Carver*, 17 How. (U. S.) 591, 15 L. ed. 179; *Rubber Co. v. Goodyear*, 9 Wall. (U. S.) 809, 19 L. ed. 587.) All parties to a conveyance are entitled to a day in court, and to a full and fair opportunity to sustain the validity of such a transaction. (*Kennedy v. Kennedy*, 66 Ill. 190; *Weaver v. Alter*, 3 Woods (U. S.), 152, Fed. Cas., No. 17,308.) "Where the witnesses appear and testify in a court of equity and there is a substantial conflict in the evidence, the appellate court will not disturb the findings and judgment of the trial court." (*Morrow v. Matthews*, ante, p. 423, 79 Pac. 196-200; *Kendrick State Bank v. Northern Pac. Ry. Co.*, ante, p. 483, 79 Pac. 457; *Spencer v. Morgan*, ante, p. 542, 79 Pac. 459.) Section 3022 of the Civil Code provides: "In all cases arising under the provisions of this title except as otherwise provided in the last section, the question of fraudulent intent is one of fact and not of law; nor can any transfer or any change be adjudged fraudulent solely on the ground that it was not made for a valuable consideration." (*Windhaus v. Bootz*, 92 Cal. 617, 28 Pac. 557; *Bull v. Bray*, 89 Cal. 286, 26 Pac. 873, 13 L. R. A. 576; *Jamison v. King*, 50 Cal. 136; *Miller v. Stewart*, 24 Cal. 504; *Threlkel v. Scott*, 89 Cal. 351, 26 Pac. 879.) Fraud will not be presumed, and if relied upon must be demonstrated by clear and convincing evidence. (*Lalone v. United States*, 164 U. S. 255, 17 Sup. Ct. Rep. 74, 41 L. ed. 425; *Wood v. Davis*, 108 Fed. 130; *Holton v. Davis*, 108 Fed. 138-151, 47 C. C. A. 246; *Bigelow on Fraud*, 489.) In view of these disclosures it is difficult to see how Kerns, as receiver, can complain of these various transactions. Where a creditor participates in or assents to a conveyance of which he complains, he cannot be

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heard to assert that the transfer was fraudulent as to him. (*White v. Banks*, 21 Ala. 706, 56 Am. Dec. 283; *Smith v. Wells Mfg. Co.*, 148 Ind. 333, 46 N. E. 1000; *Perisho v. Perisho*, 71 Ill. App. 222; *Zuver v. Clark*, 104 Pa. St. 222; *Simon v. Levy*, 36 Fla. 438, 18 South. 777.) It can hardly be claimed by Kerns that there was any fraud in Keane's purchase of McAulay's interest after he had first obtained an option for the release of the judgment. If there was no fraudulent intent at the time of its inception, it will not be made so by the subsequent conduct of the parties. (19 Am. & Eng. Ency. of Law, 269; *Page v. Kendrick*, 10 Mich. 300; *Benson v. Maxwell* (Pa.), 14 Atl. 161; *Sommerville v. Horton*, 4 Yerg. 541, 26 Am. Dec. 242.)

AILSHIE, J.—This action was commenced in the district court to enjoin the defendant sheriff from selling at execution sale a thirteen-sixteenths interest in the California lode claim. In the year 1893, the Coeur d'Alene Bank became insolvent, and at the instance of Van B. DeLashmutt and George B. McAulay, a receiver was appointed to take charge of the property and effects of the insolvent bank. At the time the bank went into the hands of the receiver, McAulay and DeLashmutt were indebted to the institution in the sum of \$46,523.67 on overdrafts. This indebtedness from McAulay and DeLashmutt was never paid, and in the meanwhile both debtors left the state. In 1900, the receiver commenced an action and attached a thirteen-sixteenths interest in the California lode claim, which was then owned by McAulay. Service of summons was had by publication, and on March 12, 1901, a judgment was entered for something over \$51,000. On the twenty-fourth day of June, 1901, the receiver procured an order from the district judge authorizing him to enter into a contract for the release of his judgment lien against the California lode claim for the sum of \$6,000, and such other conditions and terms as to assessment work, and the care and protection of the property as the receiver might see fit to impose, and in pursuance of such order, and on the same day, the receiver entered into an agreement with J. P. Keane whereby Keane obtained an option to purchase the

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judgment lien for the sum of \$6,000 within six months and cause the annual assessment work to be done prior to the 1st of September following, and also to proceed with due diligence to secure a patent for the claim. Thereafter, and on the fifth day of July following, Keane secured a deed from McAulay to all of McAulay's interest in the California lode claim. This deed recites the consideration as being: "The sum of one dollar and other good and valuable consideration, gold coin of the United States." On the 26th of September following, Keane proceeded in the name of the defendants, McAulay and DeLashmutt, and appearing specially in the district court, moved to dissolve the attachment and vacate the judgment previously entered in the case of the receiver against McAulay and DeLashmutt on the ground that the affidavit for attachment was defective and that the attachment was invalid and void, and that the service having been made by publication, no personal judgment could be entered against the defendants. That motion was sustained by the trial court and the receiver prosecuted an appeal, and the judgment of the lower court was affirmed in *Kerns v. McAulay*, 8 Idaho, 558, 69 Pac. 539. The receiver thereafter commenced a new action against McAulay and DeLashmutt in the district court for Shoshone county, and secured a writ of attachment and caused the same to be levied upon the thirteen-sixteenths interest in the California lode claim, standing on the records in the name of Joseph P. Keane. Such proceedings were thereafter had that on the first day of June, 1903, a judgment was entered in favor of the receiver and against the defendants for the sum of \$58,950.76. On this judgment execution was issued and placed in the hands of the sheriff, directing him to sell the attached property, and he thereupon proceeded and gave notice that on the twenty-ninth day of June, 1903, he would sell the thirteen-sixteenths interest of the California lode claim, standing on the records in the name of Keane, to satisfy such judgment. On the twenty-fifth day of June, and four days prior to the date on which the sale was to be made, Keane executed a deed for such property to the California Consolidated Mining Company, a corporation, for a consideration stated in the deed to be two hundred and sixty-six

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thousand six hundred and sixty-six and two-third shares of the capital stock of the corporation. The deed was acknowledged before Albert H. Featherstone, Keane's attorney, and one of the directors of the California Consolidated Mining Company. The deed was recorded on June 26th, and on the same date this action was commenced against the sheriff to restrain and enjoin the execution sale. On order of the court the receiver was made a party defendant, and he answered setting up the history of the transaction and alleging that the transfers from McAulay to Keane and from Keane to the Consolidated Mining Company were fraudulent transfers made for the purpose of hindering and delaying McAulay's creditors, and especially the receiver of the Coeur d'Alene Bank. The case went to trial before the court, and he found for the plaintiff and entered his judgment perpetually enjoining and restraining the sale of the property on execution, from which judgment the defendants appealed within sixty days and bring the case here on a statement and bill of exceptions.

The contention of the appellants is that these several transfers and transactions between McAulay, Keane and the Consolidated Mining Company were fraudulent and void as to McAulay's creditors.

There is practically no conflict in the evidence in this case. The real controversy is as to what conclusion should be drawn from the facts and circumstances shown in the case. McAulay was largely indebted—\$58,000—to the receiver of the Coeur d'Alene Bank, and was not meeting these obligations; was trying to purchase through his apparent agent, Keane, obligations held against him at from twenty to forty per cent of the face value thereof; had no tangible property within the state of Idaho, except his interest in the California lode claim; left the state and avoided the service of process, and accordingly prevented the entry of a personal judgment against him in the state of Idaho; allowed the attachment proceeding against the California lode claim to go by default and a judgment *in rem* to be entered for exceeding \$58,000, and took no steps to pay the same, but allowed execution to be issued thereon. These things were all personally known to Keane, who in the

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meanwhile secures a contract whereby he acquires the right to purchase the judgment lien for the sum of \$6,000, and then turns around and secures a deed from McAulay to the same property, reciting a consideration of \$1 "and other good and valuable consideration," and in the face of this state of facts claims that he is an innocent purchaser for a valuable consideration. No attempt was made by the plaintiff to show what the "other good and valuable consideration" was. The recital of the money consideration of \$1 explains itself, but the further recital as to "other good and valuable consideration" means nothing, and would be given no weight in the absence of evidence explaining the nature and character of that consideration. It is peculiar that Keane would have on June 24th considered the property worth his paying \$6,000 for the release of the receiver's judgment lien, and in ten days thereafter would consider \$1 an adequate consideration for the property, if it was not in fact agreed between him and the vendor that either the payment of this judgment should be a part of the purchase price for the property, or else it was their joint purpose to defeat the payment of this claim entirely. Belief in either of these conclusions would be fatal to the plaintiff's right of recovery, but it would be much the more charitable view to say that the payment and discharge of this judgment lien was really intended to be a part of the consideration for the execution of the deed from McAulay to Keane. On this point we have the evidence of Keane himself as follows:

"On about August 22, 1902, I made an agreement with Mr. McAulay that if I ever made anything out of the California, I would take up the outstanding claims and settle them against the bank for twenty cents on the dollar. And since then I have advertised for and purchased several claims under that agreement even though I have not made anything out of the California up to this date. Q. Well, are you doing this as a matter of charity to Mr. McAulay? A. No; Mr. McAulay said when he transferred the California to me that part of the consideration was that I would pay up those claims. I told him that if he so understood it, that if I ever made anything out of the California over and above what it really cost me at that

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time, I would so settle them up, and I have published advertisements in the 'Wallace Press' to take them up. Q. Why don't you file them with the receiver? A. I can't answer that question as I would like to. That's the only answer I can give. Q. Then, as a matter of fact, you have been acting for McAulay? A. No, sir."

It is contended by the respondent that the evidence fails to show that McAulay was insolvent at the time he made the transfer of this property to Keane. We think, however, that the presumption to that effect raised by the record is so strong that such a conclusion could not be avoided in the absence of evidence showing to the contrary. A man is legally insolvent when he becomes unable to pay his debts as they mature in the ordinary course of the business in which he is engaged. (Cases cited in 16 Am. & Eng. Ency. of Law, 2d ed., p. 636, note 2.) If he is able to pay them, but will not do so, and his creditors cannot discover the property out of which to make the claims, the creditors and the courts have a right to proceed against him under the rules of equity applicable to insolvents, and he who would refute the presumption thus raised against him should be required to produce the evidence which is easily within his reach. That he was not paying his debts as they became due is evident, and that he had no property other than the California lode claim in the state of Idaho out of which collections could be made, is conceded. There is injected into this record some rumor that at about the time of this transaction McAulay was reported to have made a large sum of money out of some mining speculation in British Columbia, but the plaintiff did not attempt to prove any such fact. It is true that Keane at one place in his testimony said McAulay was solvent, but that is a mere conclusion, and without the facts on which it was based could have but little weight as evidence. We think, however, that in a case like this, where the transaction has taken place within this state, and the obligations and liabilities have arisen in this jurisdiction, and the creditor is seeking to enforce the obligation under the laws of this jurisdiction, and he establishes the inability of the debtor to respond so far as his property or assets within the state are concerned, that he has

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then succeeded in establishing at least a *prima facie* case of insolvency. A creditor cannot be compelled to exhaust the remedies of foreign jurisdictions and incur the risk of there meeting the pleas of statutes of limitations and other perhaps more burdensome and exacting remedies before he can be said to have established the fact of his debtor's insolvency.

Under the facts in this case it is clear to our minds that Keane was not an innocent purchaser of this property in good faith, and for a valuable consideration, unless it be that the balance of the consideration to be paid for the property was to be the payment of this judgment, and in that event he has not paid the consideration, and should not be allowed to enjoin its collection.

The plaintiff, the California Consolidated Mining Company, a corporation, is only another name for Keane, so far as this transaction was concerned. He was the promoter, principal incorporator, manager and resident director of the company, and notice to him was notice to his *alter ego*, the corporation. Aside from all this there was no delivery of the deed to the corporation, prior to the commencement of this action. Keane executed the deed and caused his attorney, who was also a director of the corporation, to have it recorded, but no other officer had any knowledge of the transfer, and no action of the corporation was taken in the matter, either as to the transfer or the commencement of this action. In fact, it appears that the shares of stock recited as the consideration for this deed have never been delivered to Keane, but were held in escrow pending his clearing the title to the California Lode. With reference to his connection with this company he testifies:

"I was one of the incorporators of the California Consolidated Mining Company; I have been acting as manager of the company since its organization; a resident director; at the immediate time I deeded that thirteen-sixteenths interest to the corporation plaintiff, I did not consult with the president of the corporation in regard to that deed. I made the deed to the corporation voluntarily, and no stock was delivered or issued to me at the immediate moment; as soon as the deed was recorded it was forwarded to the president of the corporation;

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the deed was forwarded to James Viles, room 809, 150 La Salle St., Chicago, Illinois. I have no knowledge of any action by the board of directors of the company to institute this suit, or authorizing the issuance to me of any stock. If the board had taken any such action I should know. The only officer of the company I consulted was Mr. Featherstone. Mr. Featherstone is my attorney and also a director in the company; the board of directors is composed of five members; Mr. Viles is president, and was at the time the suit was brought. I wrote to Mr. Viles as soon as I had brought the suit. I did not ask of him any authority to bring the suit. The California Consolidated Mining Company has had no other managing officer in this county, except myself since its organization; authority was given me as manager to look after the entire interests of the company. I do not remember positively that there is a record of any authority."

Keane has been the chief actor and moving spirit in all the steps taken by McAulay and the California Consolidated Mining Company, looking to the transfer of this California Lode. He seems to have been, if not in fact the agent, the confidential of McAulay, and Kerns testified that when he would write to McAulay about any of the claims of the insolvent bank against him, that the answers to his letters would come from Keane. This was very strong evidence that a close and confidential relation existed between these two men. With all of these relations established and attended with the foregoing circumstances, and many things which have not been recited herein, considered in connection with the result which would be accomplished by means of these transactions, if a court should hold them reasonable and fair, we cannot avoid the conclusion that the plaintiff has no standing in this case in a court of equity. It is claimed that as a matter of fact no fraudulent intent has been shown in this case, but we think it has clearly been done in contemplation of law.

It is generally impossible to ascertain the *actual* intent that was in the mind of the debtor when he transferred his property, and courts of equity do not undertake to ascertain that intent. It is rather the inference of intent which the law

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draws from the acts of the debtor viewed in the light of circumstances and conditions under which he acted, and the result accomplished by those acts. In other words, it is the motive which the law imputes to him irrespective of his actual intent. (*Potter v. McDowell*, 31 Mo. 62; *Belford v. Crane*, 16 N. J. Eq. 265, 84 Am. Dec. 155; *Cole v. Tyler*, 65 N. Y. 73; *Hunters v. Waite*, 3 Gratt. 32; *Patten v. Casey*, 57 Mo. 118; 2 Bigelow on Fraud, 376 et seq.)

A conveyance for a mere nominal consideration as this appears to have been from McAulay to Keane should be subjected to the same rules applicable to voluntary transfers. (*Worthington v. Bullitt*, 6 Md. 198; note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 739.)

Respondent argues that appellants have no standing in court on the allegations of fraudulent transfers as contained in the cross-complaint, for the reason that they did not make the grantors, McAulay and Keane, parties and bring them into the case. There is some apparent conflict among the authorities as to whether a fraudulent grantor is a necessary party to an action by a creditor to set aside such conveyance, but the better reason seems to be in favor of the position that while he may be a *proper* party, he is not a *necessary* party. (*Potter v. Phillips*, 44 Iowa, 353; *Coffey v. Norwood*, 81 Ala. 512, 8 South. 199; *Blanc v. Paymaster Min. Co.*, 95 Cal. 537, 29 Am. St. Rep. 149, 30 Pac. 765.)

In the last case cited a demurrer was interposed on the ground of defect in the parties defendant, in that the grantors were not made parties, and the supreme court held that they were not necessary parties, and that the demurrer was properly overruled. We are satisfied that the point is not well taken in this case. Besides, the plaintiff could have secured an order from the court bringing these parties into the case, if for any reason plaintiff had desired them to join issue in the case, or be bound by the judgment.

The judgment in this case must be reversed, and it is so ordered, and the perpetual injunction is dissolved and the cause is remanded, with directions to the trial court to make findings

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and enter judgment in accordance with the views herein expressed. Costs awarded to appellant.

Stockslager, C. J., and Sullivan, J., concur.

ON REHEARING.

(June 6, 1905.)

SULLIVAN, J.—Counsel for respondent filed a petition for a rehearing in this case. Their first contention is that the decision deprives the respondent of property without due process of law, and is for that reason in contravention of the fourteenth amendment of the federal constitution; and contend that the decision in holding the conveyance from McAulay to Keane and from Keane to respondent to be fraudulent, and made with the intent to hinder, delay and defraud the creditors of McAulay, and therefore void as to him, without making McAulay and Keane parties, and giving them an opportunity to protect and defend the conveyance to the company, is to deprive respondent of property without due process of law.

If respondent considered that McAulay and Keane were necessary parties for a protection of its title, it was respondent's duty to have them brought in. Appellant was not seeking to sustain that title, but to defeat it, and respondent has had its day in court, and cannot complain that some other person has not had his day.

In preparing the opinion in this case, that contention was fully considered and Mr. Justice Ailshie there states as follows: "Respondent argues that appellants have no standing in court on the allegations of fraudulent transfers as contained in the cross-complaint, for the reason that they did not make the grantors, McAulay and Keane, parties and bring them into the case. There is some apparent conflict among the authorities as to whether a fraudulent grantor is a necessary party to an action by a creditor to set aside such conveyance, but the better reason seems to be in favor of the position that while he may be a *proper* party, he is not a *necessary* party. (*Potter v. Phillips*, 44 Iowa, 353; *Coffey v. Norwood*, 81 Ala. 512 [8 South. 199]; *Blanc v. Paymaster Min. Co.*, 95 Cal. 537 [29 Am. St. Rep.

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149, 30 Pac. 765].” We think the conclusion there reached is correct, and if respondent had desired to make McAulay and Keane parties in order to protect their rights in said action, the court would have permitted it, but respondent made no application for that purpose, and it was not the duty of the appellants to do so.

It is next contended that the court failed to pass upon the point raised by respondent in its brief to the effect that no proper or sufficient exceptions were taken by appellant to the findings of fact and conclusions of law made by the trial court.

It is conceded by counsel for the respondent that the record shows the court allowed an exception to each and every finding and conclusion made, but they say there is nothing to show any exception or objection thereto by appellants. Immediately following the judge's signature to the findings of fact and conclusions of law, we find the following, to wit: “Exceptions to each and every finding and conclusion allowed defendants.” The defendants there are the appellants here. That being true, the exceptions there allowed were on behalf of the appellants, so there is nothing in that contention. And further, under the provisions of section 4427, Revised Statutes, no formal exception is required to the findings of fact and conclusions of law, which finally determine the rights of the parties.

We have examined the other points suggested in the petition for rehearing and are fully satisfied that a rehearing should not be granted. A rehearing is therefore denied.

Stockslager, C. J., and Ailshie, J., concur.

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ACCOMPLICE TESTIMONY.

See Criminal Law, 5.

ACCOUNT STATED.

See Contracts, 5.

ACKNOWLEDGMENTS.

MORTGAGE—ACKNOWLEDGMENT BY MARRIED WOMEN—EVIDENCE OF NOTARY—SIGNATURE BY MARK—WITNESS TO SIGNATURE BY MARK—ADOPTION OF SIGNATURE—USURY—AGREEMENT TO PAY TAX ON LOAN—VOID CONTRACT—CLAIM AGAINST ESTATE OF DECEASED—ALLOWANCE OF MORTGAGE INDEBTEDNESS—MORTGAGEE MAY FORECLOSE.

1. Where a notary explains to a married woman that the instrument to which her name is appended is a mortgage upon certain real estate, and the nature and contents thereof, and the property encumbered thereby, and she thereupon replies that whatever her husband does or says is all right with her and that he is a good man and she has confidence in him, and will do whatever he does, *held*, that such facts constitute a sufficient acknowledgment and justify the notary in attaching his certificate of acknowledgment in due form to such instrument. (First Nat. Bank of Hailey v. Glenn, 224.)

2. Where a married woman acknowledges an instrument in due form, and at the time of such acknowledgment her name is after

fixed to such instrument as follows: "Jennie X Glenn," but her
mark

signature by mark is not witnessed by any person writing his name as a witness thereto, *held*, that by such acknowledgment she adopted and approved the signature as her own and thereby acknowledged the execution of the same as her act; and the officer's certificate of her acknowledgment attached thereto is a sufficient witnessing of her signature by mark and constitutes a compliance with section 16, Revised Statutes, which provides that "Signature or subscription includes mark, when the person can-

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ACKNOWLEDGEMENTS (Continued.)

not write, his name being written near it, and witnessed by a person who writes his own name as a witness." (First Nat. Bank of Hailey v. Glenn, 224.)

3. An officer cannot lawfully take the acknowledgment to an instrument of a person whose name is not at the time affixed to the instrument, and does not appear thereon. (First Nat. Bank of Hailey v. Glenn, 224.)

4. Under section 2960, Revised Statutes, an acknowledgment to the execution of an instrument carries with it an adoption of the signature thereto, and recognition of the same as the name and signature of the person making such acknowledgment. (First Nat. Bank of Hailey v. Glenn, 224.)

5. A notary who has taken the acknowledgment to a mortgage should not be allowed to give testimony upon the foreclosure thereof impeaching, or tending to impeach, his certificate of acknowledgment. (First Nat. Bank of Hailey v. Glenn, 224.)

6. The certificate of acknowledgment to an instrument made by the officer constitutes his official statement and declaration made at the time of the act as to the truth and accuracy thereof, and is more likely to be true and correct than the memory of such person in years afterward. (First Nat. Bank of Hailey v. Glenn, 224.)

ADVERSE POSSESSION.

See Color of Title; Municipal Corporations, 1; Railroads, 6, 7.

ANIMALS.**CONSTITUTIONAL LAW—TWO-MILE LIMIT LAW—HERDING AND GRAZING SHEEP—DAMAGES—ELEMENT OF—CONFLICT IN EVIDENCE.**

1. The construction placed on sections 1210 and 1211, Revised Statutes, in the cases of *Sifers v. Johnson*, 7 Idaho, 798, 97 Am. St. Rep. 271, 65 Pac. 709, 54 L. R. A. 795, and *Sweet v. Ballentine*, 8 Idaho, 431, 69 Pac. 993, holding the provisions of said sections constitutional is the settled law of this state. (Spencer v. Morgan, 542.)

2. The keeping of livestock is under the police regulation of the state, and such police regulation extends over the public lands of the United States within the state. (Spencer v. Morgan, 542.)

3. Under the provisions of section 1320, Revised Statutes, the land owner is not required to fence against sheep or swine. (Spencer v. Morgan, 542.)

4. The measure of damages in this case, if the respondent finally recovers the sheep and their increase, or their value, and the value of the wool shorn from the sheep, is that the appellant would be entitled, as an offset thereto, to the reasonable cost of

ANIMALS (Continued).

shearing the sheep while they were in his possession and marketing the wool; but would not be entitled to the cost of keeping the sheep except from the date of the judgment of the court below until the termination of the retrial of the case after this decision. (*Cunningham v. Stoner*, 549.)

APPEAL AND ERROR.***Appeal from Order of Commissioners—Undertaking.***

1. The provisions of section 1778, Revised Statutes, as amended by act of February 14, 1899 (Sess. Laws 1899, 249), requiring the clerk to transmit the papers on appeal from an order of the board of commissioners to the district judge within five days after the service of the notice of appeal is not jurisdictional, and a failure to do so does not deprive the appellant of the benefits of his appeal. (*Humbird Lumber Co. v. Kootenai Co.*, 490.)

2. An appeal from an order of a board of county commissioners is perfected by serving upon the clerk of the board a notice of appeal as required by section 1777, Revised Statutes of 1887, as amended by act of February 14, 1899 (Sess. Laws 1899, p. 248), and the giving and filing an undertaking is not jurisdictional, and the appeal should not be dismissed for a failure to give an undertaking in the absence of an order of the district judge requiring such undertaking. (*Great Northern Ry. Co. v. Kootenai County*, 379.)

3. An appeal from an order of a board of county commissioners is perfected by serving upon the clerk of the board a notice of appeal as required by section 1777, as amended by act of February 14, 1899 (Sess. Laws 1899, p. 248), and the giving and filing an undertaking is not jurisdictional, and the appeal should not be dismissed for a failure to give an undertaking in the absence of an order of the district judge requiring such undertaking. (*Kootenai Valley Ry. Co. v. Kootenai County*, 386.)

Appeal from Board of Equalization.

4. Section 1776, Revised Statutes, as amended at the Session of 1899, providing for appeals from the order of boards of county commissioners, does not authorize an appeal from an order of a board of equalization. (*Feltham v. Board of Commrs.*, 182.)

5. An appeal taken when not authorized by law confers no jurisdiction on the court to which such appeal is taken, except to make its order and judgment dismissing such appeal. (*Humbird Lumber Co. v. Morgan*, 327.)

6. There is no authority in this state for an appeal from an order of a board of equalization. *Feltham v. Board of County Commissioners*, ante, p. 182, 77 Pac. 332, approved and followed. (*Humbird Lumber Co. v. Morgan*, 327.)

APPEAL AND ERROR (Continued).***Appeal from Justice and Probate Courts—Undertakings.***

7. Under the provisions of section 4838, Revised Statutes, an appeal may be taken within thirty days after the rendition of a judgment by a probate judge or justice of the peace, and the appeal is taken by filing a notice of appeal with the justice or judge and serving a copy on the adverse party. (Perkins v. Bridge, 189.)

8. Under the provisions of section 4842, Revised Statutes, such appeal is ineffectual for any purpose unless an undertaking be filed with two or more sureties, and the adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they, or other sureties, justify within five days thereafter, upon notice to the adverse party to the amount stated in their affidavits, the appeal must be regarded as if no undertaking had been given. (Perkins v. Bridge, 189.)

9. In case such sureties fail to appear and justify, the undertaking signed by them is void, but the appellant may file a new undertaking at any time prior to the expiration of the thirty day period given in which to take the appeal, but notice of the filing of such undertaking ought to be given to the adverse party. (Perkins v. Bridge, 189.)

10. The rule of the district court requiring the transcript on appeal in all cases appealed from a justice's court to be filed in the district court within ten days after such appeal is perfected, and if not so filed the appeal may be dismissed on motion is not jurisdictional and should be applied with discretion. (Perkins v. Bridge, 189.)

Assignment of Errors.

11. Where a motion for a new trial has been made and the statement used on such motion contained an assignment and specification of errors, and an appeal is taken from the order denying the motion and the original brief of appellant contains no enumeration of errors relied on, but refers to the transcript and discusses such errors, and prior to the argument in the appellate court a supplemental brief is filed by appellant making a specific enumeration of such errors, the same will be regarded as a substantial compliance with the rules of this court and the case will be examined on the merits. (Whitney v. Dewey, 633.)

12. Section 4427, Revised Statutes, gives to an aggrieved party an exception to the ruling of the court in granting or overruling a motion for a new trial, and on appeal from such order the appellant is entitled to have the assignment and specification of errors contained in his statement used on the hearing of such motion examined and considered by the appellate court. (Whitney v. Dewey, 633.)

APPEAL AND ERROR (Continued).

13. Errors will not be considered in this court where it is shown by the record that the matters complained of were not raised on the motion for new trial and urged in the lower court. (*Watson v. Molden*, 570.)

What Appealable.

14. An order after final judgment refusing to release attached property is appealable under the statute of this state. (*Coey v. Cleghorn*, 162.)

Time of Appeal—Review of Evidence.

15. An appeal is not taken until the notice thereof is filed and served, both of which acts must be done within the statutory time. (*Moe v. Harger*, 194.)

16. The taking of an appeal is a jurisdictional question, and the court has no power to extend the time therefor, or to cure any defect therein. (*Moe v. Harger*, 194.)

17. Under the provisions of subdivision 3 of section 3807 of the Revised Statutes, if an appeal from an interlocutory judgment is not taken within sixty days after such judgment is entered, the same will be dismissed on motion. (*Richardson v. Ruddy*, 151.)

18. On an appeal from the judgment, where the same has not been taken within sixty days after the rendition thereof, the appellate court cannot examine the evidence for the purpose of ascertaining whether or not it supports the decision or verdict. (*Moe v. Harger*, 194.)

19. Under the provisions of section 4807, Revised Statutes, unless an appeal is taken within sixty days after the entry of judgment, this court is precluded from reviewing the evidence to ascertain whether it is sufficient to support the findings or judgment. (*Cunningham v. Stoner*, 549.)

Settlement of Statement.

20. It is the privilege and duty of a trial judge to require a statement on motion for a new trial or on appeal to be corrected until it conforms to the truth as to all matters it purports to contain; whether any amendments have been offered or not, and a statement should not be settled until it is so corrected if errors exist. (*Humbird Lumber Co. v. Kootenai Co.*, 490.)

Bill of Exceptions Must Save Evidence.

21. Evidence contained in transcript and not saved by bill of exceptions or statement allowed by court or judge, cannot be considered on the appeal. (*Hays v. Crutcher*, 260.)

22. Under the following stipulation of counsel, to wit: "It is hereby stipulated between counsel for the respective parties in

APPEAL AND ERROR (Continued).

this case that the same shall be heard before the supreme court at the May term thereof upon this transcript, all questions of time of service being hereby waived," *held*, that the evidence contained in the transcript cannot be considered on the appeal, as it was not saved by bill of exceptions or statement settled by the judge. (*Hays v. Crutcher*, 260.)

Transcript—Missing Papers.

23. Where it is shown by the certificate of the judge and clerk of the court in the transcript that such transcript contains all the papers, pleadings, etc., used on the hearing of a motion to release certain property from attachment after final judgment in the lower court, and thereafter the judge and deputy clerk furnish certificates or affidavits that other papers were used on the hearing, this court will not dismiss the appeal, especially when it is shown that the missing paper was a part of the record evidence of the respondent; a certified copy should have been furnished for the record by the moving party. (*Coe v. Cleg-horn*, 162.)

Law of Case.

24. The doctrine of "law of the case" extends only to the questions presented and distinctly passed upon on the former appeal. (*Hunter v. Porter*, 86.)

Review of Questions.

25. The action of the court in overruling defendant's demurrer to a complaint cannot be reviewed on an appeal taken by the plaintiff. (*Rauh v. Oliver*, 3.)

26. Where a trial has been had entirely upon depositions, and the trial court has not seen and heard the witnesses, the appellate court is in as favorable position for judging of the truthfulness of the witnesses and the weight of the evidence as the trial judge, and will consider the same as if originally heard in the appellate court. (*Roby v. Roby*, 139.)

Reversal of Cause.

27. Where there is a substantial conflict in the evidence on the material issues involved, the verdict of the jury must stand. (*Watson v. Molden*, 570.)

28. In equity cases the appellate court will examine the evidence with a view to sustain the trial court in its findings and judgment, but will reverse the judgment if the evidence is insufficient to sustain it. (*Small v. Harrington*, 499.)

29. Where there is a substantial conflict in the evidence the verdict and judgment will not be reversed. (*Spencer v. Morgan*, 542.)

APPEAL AND ERROR (Continued).

30. Where there is a substantial conflict in the oral evidence, the judgment of the court below will not be disturbed. (*Deeds v. Stephens*, 332.)

31. Where there is a substantial conflict in the oral evidence, the verdict of the jury and the judgment of the trial court will not be reversed. (*Kendrick State Bank v. Northern Pac. Ry. Co.*, 488.)

32. Where there is a substantial conflict in the evidence on material issues involved, this court will not reverse the trial court either in law or equity cases, where the case has been tried on oral evidence. (*Robertson v. Moore*, 115.)

Dismissal of Appeal.

33. Where a party has collected a judgment in his favor, and by the prosecution of an appeal from such judgment, in seeking to gain more, thereby incurs the hazard of eventually recovering less, his appeal should be dismissed. (*Bechtel v. Evans*, 147.)

34. If, however, the appeal is from such an order or judgment that the appellant could in no event recover a less favorable judgment and that he incurs no hazard of ever obtaining less than the amount received or collected by him, the reason for the rule ceases and his appeal should be allowed. (*Bechtel v. Evans*, 147.)

See Continuances, 2, 3; Criminal Law, 10.

ARGUMENT OF COUNSEL.

See Criminal Law, 6, 7.

ASSIGNMENT.

See Mortgages, 2, 3.

ATTACHMENT.**ATTACHMENT—WHAT AFFIDAVIT SHOULD CONTAIN.**

1. An affidavit for an attachment must contain an allegation in unequivocal language that the debt sued on is due before the writ of attachment should issue. (*Gatward v. Wheeler*, 66.)

ATTACHMENT—MOTION TO DISSOLVE SHOULD BE SUSTAINED—DISCLAIMER OF OWNERSHIP NOT A BAR TO A FUTURE CLAIM OF OWNERSHIP.

2. Where it is shown that a party resides upon an Indian reservation in the state, and an attachment is levied upon his property situate upon such reservation, a claim that he is not a resident of the state must fail. (*Coe v. Cleghorn*, 166.)

3. Where it is shown that an attachment was levied upon certain personal property exempt by law from seizure under an at-

ATTACHMENT (Continued).

tachment or execution proceeding, and at the time the levy was made the attached party disclaimed ownership, thereafter the attachment is discharged on motion and a second writ of attachment is issued and levied on all or part of the property originally levied upon, and at the second levy the property is claimed under the exemption laws of the state. *Held*, that under the facts in the case his first disclaimer did not waive his right to claim under the exemption laws. (*Coey v. Cleghorn*, 166.)

See Appeal and Error, 14, 23.

ATTORNEYS.

See Criminal Law, 6, 7.

ATTORNEY'S FEES.

See Mechanic's Lien, 4.

BILL OF EXCEPTIONS.

See Appeal and Error, 21, 22.

BOARD OF EQUALIZATION.

See Equalization.

BOARD OF PRISON COMMISSIONERS.

See Prisons.

BONDS.

See Appeal and Error, 1-10; Irrigation and Ditch Companies.

BOUNDARIES.**GOVERNMENT SURVEYS—MEANDER LINES—BOUNDARY LINES—ACTION TO QUIET TITLE.**

1. Where it appears from the notes and official plat founded thereon that all the lands within the legal subdivisions, as authorized to be laid out by section 2395, United States Statutes, have been returned to the government as surveyed and the remainder of the subdivision is shown to be the waters of a navigable stream, and the government issues its patent to a settler or purchaser for fractional subdivisions thereof abutting on a line which purports to meander such stream, the meander line will not be the true boundary line, but the patentee will take title to the stream. (*Johnson v. Hurst*, 308.)

BOUNDARIES (Continued).

2. Where the government has parted with a larger acreage than it has received pay for, by a patent to fractional lots abutting on a meandered stream, and the patentee takes possession, under his patent, of the lands between the meander line and the stream, he is entitled to be protected in his title and possession as against any and all third persons who do not claim title from the government. (*Johnson v. Hurst*, 308.)

3. *Id.*—In such case no one but the government or its grantee can be heard to question the title or right of possession. (*Johnson v. Hurst*, 308.)

BOUNTIES.

1. Under the provisions of section 6385, Revised Statutes, it is not required that a fraudulent bill against a county be allowed or paid before a conviction can be had, and it is no defense that the ears of the animals for which bounty was claimed were spurious and easily detected by the board of commissioners. In such case it does not require that the ears be genuine. (*State v. Adams*, 591.)

2. The provisions of section 1760b, Revised Statutes, have been superseded by act approved March 11, 1901, as to the animals named in the latter act. (*State v. Adams*, 591.)

3. Under the provisions of an act approved March 11, 1901 (Sixth Sess. Laws, 206), one may swear to his claim against the county for bounty before anyone in the county authorized to administer oaths, and on the presentation thereof with the ears, and whatever part of the pelt that the board of county commissioners may require, if such claim is valid, the board is authorized to allow it. (*State v. Adams*, 591.)

4. The fourth section of said act approved March 11th, *supra*, in regard to the making of false affidavits, was not intended to, and does not, supersede the provisions of said section 6385, but is a separate and distinct crime from the one referred to in that section. (*State v. Adams*, 591.)

5. Under the provisions of section 6385, when a false or fraudulent claim, with intent to defraud the county, is presented to the board for the purpose of procuring its allowance, the crime specified in said section is consummated. (*State v. Adams*, 591.)

CANAL COMPANY.

See Irrigation and Ditch Companies.

CERTIORARI.

See Jury, 2.

CHAMBERS.

See Courts, 3.

CHARACTER.

See Criminal Law, 4.

CHATTEL MORTGAGES.**CHATTEL MORTGAGE—RENEWAL.**

1. Where it is shown that a chattel mortgage is given as security for a debt then existing, evidenced by a promissory note of even date therewith, and thereafter a new note and chattel mortgage are given to cover the same debt, even though a different rate of interest is provided for in the new note, and an additional sum for attorney's fee provided for therein, *held*, not to be a new contract where it is stated in the mortgage that the new obligation is given for the purpose of renewal of the old. (*Vollmer v. Estate of James W. Reid*, 196.)

CLAIMS AND DELIVERY.

See Replevin.

COLOR OF TITLE.

Color of title exists wherever there is a reasonable doubt regarding the validity of an apparent title, whether such doubt arises from the circumstances under which the land is held, the identity of the land conveyed, or the construction of the instrument under which the party in possession claims his title. (*Johnson v. Hurst*, 308.)

COMMERCE.

Internal and domestic commerce are subject to the taxing and police power of the state. (*In re D. C. Abel*, 288.)

COMMISSIONERS.

See Appeal and Error, 1-5; Counties; Prisons.

CONSTITUTIONAL LAW.

1. The legislature may enact a law relative to one class of insurance so long as it is general in its terms as to that particular class of business. (*Idaho Mut. etc. Ins. Co. v. Myer*, 294.)

2. No person has a vested right in any particular mode of procedure for the enforcement or defense of his rights, and if

CONSTITUTIONAL LAW (Continued).

before trial of a cause a new law as to procedure is enacted and goes into effect, it will from that time govern and regulate the proceedings, unless the statute provides to the contrary. (*Boise Irr. etc. Co. v. Stewart*, 38.)

3. The law of evidence is a part of the remedy and is within legislative control. (*Boise Irr. etc. Co. v. Stewart*, 38.)

See Animals; Licenses; Waters and Watercourses, 1.

CONTINUANCES.

1. It is not error to overrule an application for continuance when it is not sufficiently made to appear to the court that the evidence of the absent witnesses can be furnished at a future term of the court, or that the testimony of such witnesses is material to the defendant setting out in the affidavit for continuance what defendant expects to prove by such absent witnesses. (*State v. Rooke*, 388.)

2. The action of the trial court in denying the motion for a continuance will not be reversed unless it appears that the court in denying such motion has abused its discretion. (*Richardson v. Ruddy*, 151.)

3. An application for the continuance of a cause appeals to the sound discretion of the trial court, and his ruling thereon will not be disturbed by this court unless it appears that there has been an abuse thereof. (*Robertson v. Moore*, 115.)

CONTRACTS.**CONSTRUCTION OF CONTRACT.**

1. Where E. & Co. enter into a written contract with C. & Son & Co. to complete a certain grading contract, and it is shown that C. & Son & Co. have partially completed the contract before assignment to E. & Co., and under the terms of the original contract of C. & Son & Co. with another that ten per cent of the contract price shall be retained until the final completion of the works, *held* that the words "hereafter accruing" reserves to C. & Son & Co. the ten per cent earned at the time of the assignment of the contract. (*Ercanbrack v. Faris*, 584.)

CONTRACT—RAILROAD CONSTRUCTION—COMPLAINT—DEMURRER—ESTIMATES—CLASSIFICATION—EVIDENCE—VARIANCE BETWEEN ALLEGATIONS AND PROOF—INSTRUCTIONS.

2. Complaint states a cause of action. (*Lewis v. Utah Construction Co.*, 214.)

3. Where the parties to a contract testify to an express contract but differ as to the amount to be paid or the contract price for the services rendered, evidence of the actual cost of the perform-

CONTRACTS (Continued).

ance of the work is properly admitted as it may afford some reasonable ground for believing that the contract was for the price nearest the cost. (Lewis v. Utah Construction Co., 214.)

4. Instructions examined and held to properly state the law applicable to the evidence introduced on the trial. (Lewis v. Utah Construction Co., 214.)

5. The question of whether the estimates had become an account stated was left to the jury under proper instructions. (Lewis v. Utah Construction Co., 214.)

See Counties.

CORPORATIONS.

Certificates of shares of stock in an incorporated canal or ditch company are personal property under the provisions of section 2611, Revised Statutes. (Watson v. Molden, 570.)

See Fraud; Fraudulent Conveyances.

COSTS.

1. A successful party should not be disallowed fees for witnesses who were subpoenaed and attended on the trial for the reason alone that they did not testify, but the party claiming fees for such witnesses should be required to make a satisfactory showing as to the reasons for their attendance and causes which made it necessary for them to testify. (Bechtel v. Evans, 147.)

2. Record in this case examined and held that there is no error in the order of the trial judge taxing costs. (Bechtel v. Evans, 147.)

3. Where the wife appeals in good faith and the district judge does not order the husband to pay a sufficient sum to defray the expenses of appeal, and it appears that the wife has not sufficient property or means for that purpose, this court will tax any deficiency against the husband to the end that justice may be done. (Roby v. Roby, 139.)

See Justice of Peace; Waters and Watercourses, 8-11.

COTENANTS.

See Liens.

COUNTERCLAIM.

See Setoff and Counterclaim.

COUNTIES.

Board of Equalization.

1. The county board of equalization is a constitutional board exercising powers and duties separate and distinct from those exercised by the board of county commissioners. (*Feltham v. Board of Commrs.*, 182.)

Road District Contracts.

2. A board of county commissioners has neither express nor implied power to accept the resignation of a bidder to whom they have duly and regularly awarded a contract under section 875, Revised Statutes (Sess. Laws 1899, p. 129), for the care, keeping and repair of the roads of a contract road district. (*Corker v. Commissioners of Elmore Co.*, 255.)

3. It is to the interest of the county that such contracts be enforced. On the other hand, it is against the interest of the county for contractors to be released and relieved from their obligations. (*Corker v. Commissioners of Elmore Co.*, 255.)

COUNTY COMMISSIONERS.

See Appeal and Error, 1-6; Counties.

COURTS.

Probate Courts.

1. Under the provisions of section 21, article 5 of the state constitution, probate courts are made courts of record, and are given original jurisdiction in all matters of probate, settlement of estate, of deceased persons, and appointment of guardians, and their orders and judgment in regard to those matters, cannot be attacked collaterally. (*Clark v. Rossier*, 348.)

2. The remedy for one aggrieved by an order or judgment by a probate court in said matters is in said court by proper motion or by appeal. (*Clark v. Rossier*, 348.)

Judge at Chambers.

3. A judge at chambers has no authority to hear and pass upon a demurrer. (*Price v. Grice*, 443.)

CRIMINAL LAW.

Evidence Generally.

1. It is a well-recognized principle of criminal jurisprudence that proof of certain facts may lead irresistibly to the presumption that an act of which there is no direct proof was committed. (*State v. Adams*, 591.)

CRIMINAL LAW (Continued).

2. Where it is shown that certain means were adopted to attain a certain end, and the end in itself was attained, a completion of the act will be presumed. (State v. Adams, 591.)

3. Where all the evidence in the case is consistent with defendant's innocence, and all the circumstances shown in the case are explained on that theory and appear reasonable, the defendant should be acquitted. (State v. Seymour, 609.)

Evidence of Reputation.

4. On the direct examination of a witness called to testify to the reputation of the deceased as to peace and quietude, it is not proper, over the objection of the defendant, to inquire into the relation that existed between the witness and deceased. (State v. Crea, 88.)

Accomplice Testimony.

5. Before a party charged with crime can be convicted upon the testimony of accomplices, there must be corroboration of the evidence of such witnesses. (State v. Rooke, 388.)

Statements of Prosecuting Attorney.

6. In the trial of criminal cases the county attorney should not be permitted to use language in his argument to the jury calculated to prejudice their minds against the defendant. (State v. Harness, 18.)

7. Erroneous statements of the prosecuting attorney or other counsel on behalf of the prosecution may be explained by the party making them. (State v. Rooke, 388.)

Instructions.

8. It is a statutory requirement that the court should instruct the jury in writing on all the material issues of the case, if the charge is a felony, but if he fails to do so, in order to predicate error, counsel must request the charge and have the court's refusal to give it, otherwise it is not error. (State v. Harness, 18.)

9. When the court trying the case fully and fairly instructs the jury on every question arising on the trial, it is not error to refuse instructions submitted by the defendant or prosecution. (State v. Rooke, 388.)

Excessive Sentence.

10. Where one is convicted of the crime of rape and sentenced to a term of fourteen years' imprisonment, and the case is reversed on questions of law and sent back for a new trial, this court will not examine the evidence to ascertain whether the sentence is excessive. (State v. Harness, 18.)

See Jury; Witnesses.

CROSS-COMPLAINT.

• See Pleading, 5.

DEEDS.

1. A deed absolute on its face cannot be delivered to the grantee therein named to be by him held in escrow, and a delivery which purports to be such will operate as absolute and freed from all parol conditions, and title will vest at once. (*Whitney v. Dewey*, 633.)

2. It is a settled principle of law that the evidence of delivery of a deed must come from without the deed; in other words, a deed does not upon its face show delivery, and therefore parol evidence is admissible to show such fact. (*Whitney v. Dewey*, 633.)

3. Parol evidence is inadmissible to show that a deed delivered to the grantee and absolute on its face shall take effect only upon the performance of some condition or the happening of some contingency unexpressed therein. (*Whitney v. Dewey*, 633.)

4. *Id.*—In such case the vesting of title is determined by the legal effect of the terms of the grant and cannot be controlled by parol evidence. (*Whitney v. Dewey*, 633.)

5. A grantor cannot by warranty deed, absolute on its face, and free from conditions or restrictions, convey such a title to his grantee as will enable the grantee to pass a good title to a specific corporation and at the same time attach such parol conditions to the deed upon its delivery as to preclude the grantee from transferring an equally good title to any other person or corporation. (*Whitney v. Dewey*, 633.)

6. Where B. executes a warranty deed free from any conditions or qualifications as to the vesting of title and delivers it to the grantee, W., accompanied with a contemporaneous parol agreement to the effect that W. shall form a corporation and deed the property to such corporation and thereupon pay B. \$1,000 cash and deliver to B. \$5,000 worth of first mortgage bonds of the corporation secured on the property so deeded, and the deed was placed in the hands of the grantee to facilitate such transaction; *held*, that the delivery was absolute and title vested at once in the grantee. (*Whitney v. Dewey*, 633.)

7. Even though a valid delivery of a deed had not been made at the time of its execution, still the grantor may thereafter ratify the wrongful taking of the deed by the grantee after the grantor has acquired complete knowledge of the facts of the transaction, and thereby perfect the title. (*Whitney v. Dewey*, 633.)

See Husband and Wife; Injunction, 10; Vendor and Vendee.

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DISMISSAL AND NONSUIT.

1. A motion for nonsuit should be denied unless the evidence wholly fails to establish a right of recovery. (*Small v. Harrington*, 499.)

2. Under the provisions of subdivision 5 of section 4354 of the Revised Statutes, it is error for the court to grant a nonsuit before the plaintiff has introduced his evidence or offered to do so and rested. (*Rauh v. Oliver*, 3.)

See *Mandamus*.

DISTRICT ATTORNEY.

See Criminal Law, 6, 7.

DITCH COMPANIES.

See Irrigation and Ditch Companies.

DIVORCE.

1. Where the wife abandons her husband and home in the state of Idaho, takes up her residence in the state of Oregon, and thereafter procures a decree of divorce on service by publication, forms a new community by another marriage, eight years and more after abandoning her husband returns to Idaho and by an action in the name of herself and husband as coplaintiff with her, seeks to obtain her interest in the homestead of herself and former husband, *held*, that after forming a new community she abandons all claim on the old one and cannot recover. (*Bedal v. Sake*, 270.)

2. One who voluntarily leaves this jurisdiction and the domicile and community property located in this state and obtains a decree of divorce in another jurisdiction, cannot maintain an independent action thereafter in this jurisdiction for a division of the community property. (*Bedal v. Sake*, 270.)

3. Where the husband establishes a new home and requests his wife to follow him to the new domicile, and furnishes her the means with which to travel, and she declines to take up her residence with him, the husband is not thereby guilty of deserting his wife. (*Roby v. Roby*, 139.)

4. A wife who willfully and without good cause refuses to follow her husband to the home and place of residence selected by him cannot obtain a decree of divorce from him because he fails to provide for her during the period of her refusal to reside with him. (*Roby v. Roby*, 139.)

DIVORCE (Continued).

5. Evidence examined and *held* insufficient to entitle the plaintiff to a decree of divorce. (Roby v. Roby, 139.)

See Costs, 3.

DOMICILE.

See Divorce.

ELECTION OF REMEDIES.

Where a motion is made to compel the plaintiffs to elect upon which of several causes of action or counts they would proceed to trial, it was not error for the court to reserve its decision and thereafter try the case upon the theory that said motion had been sustained and try the case upon the first and third causes of action stated in the complaint. (Lewis v. Utah Construction Co., 214.)

EQUALIZATION.

See Appeal and Error, 4-6; Counties.

EQUITY.

1. A court of equity will not relieve a party where he has had a plain, speedy and adequate remedy at law, which by his own negligence, he has refused to avail himself of. (Presley v. Dean, 375.)

2. Where one of two parties must lose, that loss should fall upon the one whose action or conduct has induced or made possible such loss. (Pennypacker v. Latimer, 625.)

3. In the trial of equity cases the court is not confined to the strict rules prescribed for the admission of evidence in law cases. (Small v. Harrington, 499.)

See Appeal and Error, 28.

ESTATES OF DECEDENTS.

See Executors and Administrators.

ESTOPPEL.

See Municipal Corporations, 1.

EVIDENCE.***Handwriting.***

1. The admission in evidence of papers irrelevant to the record for the sole purpose of creating a standard of comparison of

EVIDENCE (Continued).

handwriting should not be allowed except in cases where the papers are conceded to be genuine, or are such as the opposing party is estopped to deny or fall within some equally well recognized exception. (*State v. Seymour*, 699.)

Telephone Communications.**CONTRACT MADE BY TELEPHONE—SUBSTANTIAL CONFLICT IN EVIDENCE.**

2. *Held*, in this case that there is not a substantial conflict in the evidence and that the evidence is not sufficient to sustain the verdict. (*Wilson v. Vogeler*, 599.)

3. A conversation between respondent and one G. in regard to whether the latter could handle certain seed at a certain price, *held* hearsay and incompetent. (*Wilson v. Vogeler*, 599.)

Rejection of Evidence—Harmless Error.

4. Where certain material evidence is rejected, but the record shows that the evidence rejected was given by another witness, the error is immaterial and not prejudicial. (*Lewis v. Utah Construction Co.*, 214.)

See Constitutional Law, 2, 3; Criminal Law; Deeds; Equity, 3; Witnesses.

EXCEPTIONS, BILL OF.

See Appeal and Error, 21, 22.

EXECUTORS AND ADMINISTRATORS.

Section 5470, Revised Statutes, which provides that "No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint," does not constitute any bar to the foreclosure of a mortgage by the holder thereof against the estate of a deceased person although the claim thereby secured has been duly and regularly presented to the administrator for allowance. (*First Nat. Bank of Hailey v. Glenn*, 224.)

See Mortgages; Probate Courts.

FENCES.

See Animals.

FINDINGS.

See Judgments, 3-5.

FRAUD.

1. Where M. states to W. that certain things pertaining to the sale of shares of stock in a canal company are true, also facts pertaining to the sale of his interests in certain lands are true, and is informed by W. that he will rely upon his statements, and purchases such shares of stock and the interest of M. in the land wholly relying upon the representations of M., and such statements are afterward found to be false and resulted in inducing W. to purchase. *Held*, that M. must respond in damages for his false and fraudulent statements. (Watson v. Milden, 570.)

2. Where it is shown that W. is a stranger and unaccustomed to the wants and needs of water for irrigation of desert land, and M. is a real estate dealer accustomed to the necessity and amount of water per acre for the irrigation of land that he possesses in person by entry under the desert land laws of the United States, W. may rely upon the statements made by M., especially when he informs M. of his want of knowledge and information pertaining to such lands and stock. (Watson v. Molden, 570.)

FRAUDS, STATUTE OF.

See Specific Performance.

FRAUDULENT CONVEYANCES.

FRAUDULENT CONVEYANCE—WANT OF CONSIDERATION—INTENT TO HINDER, DELAY OR DEFRAUD CREDITORS—NOTICE TO CORPORATION—NECESSARY PARTIES DEFENDANT.

1. Where K. takes a deed from McA. to all his interest in a mining claim, which is all the property McA. has in this state, for a consideration of one dollar and "other good and valuable consideration," which latter consideration is not explained, and at the time of such transfer K. has notice that his grantor is heavily indebted in this state and has avoided personal service of process and has allowed a judgment *in rem* entered against him for over \$50,000, and has been trying to buy up such claims at one-fifth their face value, and that he is not meeting his obligations in due course of business, and that he has no other property in the state out of which such indebtedness can be made, and during the meanwhile K. had occupied a close confidential relation with McA.—under such circumstances, *held*, that K. cannot restrain an execution sale of such property to pay creditors on the theory that he is an innocent purchaser for a valuable consideration. (California Cons. Min. Co. v. Manley, 786.)

2. The intent with which a transfer in fraud of creditors is made is not established so much by attempting to ascertain the

FRAUDULENT CONVEYANCES (Continued).

actual intent in the mind of the debtor, but rather by the facts and circumstances under which the transfer was made and from which the law imputes a fraudulent motive. (California Cons. Min. Co. v. Manley, 786.)

3. A conveyance made for a mere nominal consideration when attacked as fraudulent will be subjected to the same rules applicable to voluntary transfers. (California Cons. Min. Co. v. Manley, 786.)

4. Notice to a person who was the promoter in the organization of a corporation, a principal incorporator and who is manager and resident director is such notice to the corporation that it cannot avail itself of the protection of law to which an innocent purchaser is entitled. (California Cons. Min. Co. v. Manley, 786.)

5. Where C. Co. seeks to restrain an execution sale on the grounds that it is an innocent purchaser for a valuable consideration, and K. is brought in as a defendant and files a cross-complaint to set aside the sale to C. Co. as fraudulent, the fraudulent grantors are not necessary parties. (California Cons. Min. Co. v. Manley, 786.)

GRAZING.

See Animals.

GRUBSTAKE CONTRACT.

See Mines and Mining.

GUARDIAN AND WARD.**GENERAL GUARDIAN—POWERS AND AUTHORITY TO INCUR EXPENSE IN LITIGATION OVER PROBATE OF WILL—JURISDICTION OF PROBATE COURT PLENARY WHEN ONCE ACQUIRED.**

1. The probate courts of this state have jurisdiction to appoint a guardian for minors domiciled in the state, and after having made such appointment the courts retain jurisdiction for all purposes in connection therewith until the guardian's accounts are rendered and he is legally discharged. (In re Guardianship of Arva and Elmer Brady, 366.)

2. Where a testamentary guardian for minor children is named by the last will and testament of a decedent, and there is reasonable ground to believe that the will is valid and legal, a general guardian of the minors is justified in incurring the expenses necessary in resisting a contest of such will, even though he should fail to establish its validity. (In re Guardianship of Arva and Elmer Brady, 366.)

3. In a petition for the settlement and allowance of a guardian's account, it is not necessary to allege the steps taken in pro-

GUARDIAN AND WARD (Continued).

curing his appointment, since probate courts are, in such matters, courts of general jurisdiction, and every intendment is in favor of the regularity of their judgments and orders. (*Clark v. Rossier, ante*, p. 348, 78 Pac. 358, approved and followed.) (In re Guardianship of Arva and Elmer Brady, 366.)

HABEAS CORPUS.**HABEAS CORPUS—DISCHARGE OF PRISONER—FILING INFORMATION—LOSS OF COMPLAINT—PRESS OF BUSINESS—PRELIMINARY EXAMINATION.**

1. Under the provisions of section 8112, Revised Statutes, the court, unless good cause to the contrary is shown, must order the prosecution dismissed when a person has been held to answer for a public offense where an indictment or information is not found or filed against him at the next term of said court at which term he is held to answer. (In re Shirley Jay, 540, 542.)

2. That the complaint filed with the committing magistrate had been lost and the information of the loss not communicated to the prosecuting attorney until about two weeks before the beginning of the term of court, and press of business on the part of the prosecuting attorney is not a "good cause to the contrary" within the meaning of that term as used in said section. (In re Shirley Jay, 540, 542.)

PRELIMINARY EXAMINATION—HOLDING PRISONER WITHOUT REASONABLE OR PROBABLE CAUSE CANNOT BE INQUIRED INTO ON HABEAS CORPUS AFTER CONVICTION—REVERSIBLE ON APPEAL.

3. Where a prisoner has been convicted in a court of competent criminal jurisdiction, and by such court committed to the state penitentiary, it is too late for the prisoner, on application for discharge on *habeas corpus*, to raise the question that the evidence produced against him at the preliminary examination did not show the commission by him of any offense, and that he was committed without reasonable or probable cause. (In re Knudtson, 676.)

4. The supreme court is a court of original jurisdiction on applications for *habeas corpus*, and in the exercise of that jurisdiction cannot review as upon appeal questions which were properly presentable to the trial court upon arraignment or subsequent thereto. (In re Knudtson, 676.)

HANDWRITING.

See Evidence, 1.

HERDING.

See Animals.

HIGHWAYS.

See Counties.

HOMESTEADS.**CONVEYANCE BY MARRIED WOMEN—SALE OF HOMESTEAD—CONSTRUCTION OF STATUTES.**

1. Where W. and W., husband and wife, enter into an oral contract for the sale of their homestead, and the purchaser takes possession thereof, and pays the purchase price and makes valuable improvements thereon, all of which are done with the full knowledge and consent of the wife, the purchaser is entitled to a decree requiring them to convey said premises to him. (*Grice v. Woodworth*, 459.)

2. The provisions of sections 2921, 2922, 3040 and 3041 of the Revised Statutes were enacted for the purpose of protecting the homesteads and other rights of married persons, particularly the wives, and were not intended to operate as a shield to relieve against a fraudulent transaction on their part. (*Grice v. Woodworth*, 459.)

3. Sections 3040 and 3041, Revised Statutes, are in their nature rules of evidence and are subject to the same legal principles as are conveyances falling under the statute of frauds and the rules of equitable estoppel and waiver. (*Grice v. Woodworth*, 459.)

HOMICIDE.

1. Where the defendant seeks to show the superior physical strength of the deceased when compared with his own, the evidence should be confined to the strength of each at the time of the homicide. (*State v. Crea*, 88.)

2. It was error to reject evidence tending to show that the defendant was behind the bar in a saloon and could not retreat out of reach of the deceased to escape his attack. (*State v. Crea*, 88.)

3. It was error to instruct the jury that "if the evidence shows an unlawful killing, then in order for such unlawful killing to be manslaughter and not murder, there must have been shown by the evidence to have been a serious and highly provoking injury inflicted upon the person killing, . . . or an attempt by the person killed to commit a serious injury on the person killing," as the language there used under the provisions of section 6570, Revised Statutes, would be justifiable homicide and not manslaughter. (*State v. Crea*, 88.)

HUSBAND AND WIFE.

WIFE'S SEPARATE PROPERTY—SALE OF SEPARATE PROPERTY—RECOVERY OF PURCHASE PRICE.

1. Where the wife sells her separate property without joining her husband in an instrument in writing conveying the same, as provided by section 2498, Revised Statutes, and the purchaser receives, uses and consumes the property and is thereafter sued for the purchase price, he is estopped from interposing the defense that the contract of sale was not entered into in the manner pointed out by the statute. (*Karlson v. Hanson etc. Co.*, 361.)

2. Section 2498, Revised Statutes, was enacted primarily for the protection of the wife against fraud and duress, and was not intended as a shield for the defense of those who would cheat and swindle her. (*Karlson v. Hanson etc. Co.*, 361.)

See Acknowledgments; Costs, 3; Witnesses, 4.

INDICTMENT AND INFORMATION.

1. Where the complaint filed by the committing magistrate has been lost, it is not necessary to hold another preliminary examination before an information can be legally filed, and especially is that true where the defendant waived a preliminary examination. (*In re Shirley Jay*, 540.)

2. Under our system of prosecutions upon information, a prosecuting attorney has no right to file an information against anyone where the depositions taken at the preliminary examination fail to disclose any reasonable or probable cause for believing the defendant guilty of an offense, unless the defendant has waived examination. (*In re Knudtson*, 676.)

3. Under the provisions of section 2, Fifth Session Laws, 1889, page 125, requiring the prosecuting attorney to indorse on the information the names of all witnesses known to him at the time of filing the same, and it is sought to have the names of other witnesses indorsed on the information after the same has been filed, the court must be satisfied that the names of such witnesses were not known to the prosecuting attorney at the time the information was filed before such names are allowed to be indorsed thereon. (*State v. Crea*, 88.)

4. Names of witnesses may be indorsed on the information at the beginning of the trial when it satisfactorily appears to the court that the prosecuting officer could not reasonably have asked such permission at an earlier time. (*State v. Rooke*, 388.)

5. Under the provisions of section 7855, Revised Statutes, a failure by the clerk to read the indictment or information and

INDICTMENT AND INFORMATION (Continued).

state the plea of the defendant to the jury is reversible error. (State v. Crea, 88.)

See Habeas Corpus; Larceny, 1, 2.

INFANTS.

See Guardian and Ward.

INFORMATION.

See Indictment and Information.

INJUNCTION.

1. A large discretion is vested in the trial court in the granting of temporary injunctions to hold property *in statu quo* pending the determination of the action, and its exercise will not be reversed on appeal unless a clear abuse is shown. (Shields v. Johnson, 454.)

2. The statute (Rev. Stats., sec. 4288) authorizing the issuance of injunctions is liberally construed by the courts. (Shields v. Johnson, 454.)

3. Where the principal allegations in a verified complaint are made on information and belief, and the sources of information and basis of belief are not stated in the complaint but are stated in an affidavit filed in the case, an injunction may be granted thereon if the facts warrant it. (Price v. Grice, 443.)

4. Where a restraining order is granted holding the matter *in statu quo* until a hearing thereon is had, and the hearing is had and the restraining order is continued in force upon condition that the plaintiff give a proper undertaking in a certain sum named, the action of the judge will not be reversed, for the reason that no undertaking was required prior to the hearing. It is error to grant a temporary injunction without requiring a proper undertaking. (Price v. Grice, 443.)

5. Under the provisions of section 4288, Revised Statutes, where the facts are in dispute, the granting or dissolving of an injunction is within the sound discretion of the court. (Price v. Grice, 443.)

6. The right to a preliminary injunction is generally addressed to the sound discretion of the court to be exercised according to the circumstances of each case. (Price v. Grice, 443.)

7. Where the application for dissolving a preliminary injunction is heard upon the complaint and answer, it was not error for the judge to permit the plaintiff at the hearing to file an affidavit showing the sources of information and basis of belief of the allegations of the complaint which were stated therein on information and belief. (Price v. Grice, 443.)

INJUNCTION (Continued).

8. Upon a proper showing an injunction may issue to temporarily restrain an act which will result in great damage to the plaintiff although the injury is not irreparable and notwithstanding the plaintiff may have other remedies, following *Staples v. Rossi*, 7 Idaho, 618, 65 Pac. 67. (*Price v. Grice*, 443.)

9. Judgment held sufficiently certain to warrant the issuance of an injunction. (*Wilson v. Eagleson*, 767.)

10. Where M. sells a tract of land to W. and others, and places a deed therefor in escrow and upon payment of the balance due on the escrow, M. refuses to surrender possession of the premises, the grantees are not thereby entitled to an injunction restraining M. from drawing the purchase money from the bank holding the escrow until the termination of an action for damages for unlawfully holding possession. (*Williamson v. Moore*, 749.)

11. Courts of equity should hesitate before granting injunctions to restrain trespass committed under color of title or right. (*Shields v. Johnson*, 454.)

12. When the adverse party moves to dissolve a temporary injunction upon the papers on which it was granted, no notice is required to be given to the party who obtained the injunction. *Thayer v. Bellamy*, 9 Idaho, 1, 71 Pac. 544, approved and followed. (*Meyer v. First Nat. Bank of Coeur D'Alene*, 175.)

13. That portion of section 5242, United States Statutes (Comp. Stats. 1901, vol. 3), which provides that "No attachment, injunction, or execution shall be issued against such association (national bank) or its property before final judgment in any suit, action or proceeding in any state, county or municipal court," is a complete bar to the issuance of any such writ or order from a state court against a national banking association. (*Meyer v. First Nat. Bank of Coeur D'Alene*, 175.)

14. Complaint and affidavits examined and held sufficient to authorize issuance of injunction against all defendants except one named as a national bank. (*Meyer v. First Nat. Bank of Coeur D'Alene*, 175.)

See Irrigation and Ditch Companies, 3.

INSTRUCTIONS.

See Criminal Law, 7, 8.

INSURANCE.

See Constitutional Law, 1.

INTEREST.

See Usury.

INTERSTATE COMMERCE.

See Commerce; Licenses.

INTOXICATING LIQUORS.

See Municipal Corporations, 3-5.

IRRIGATION AND DITCH COMPANIES.

In General.

1. A canal or ditch company, corporation or person owning and operating a canal or ditch in this state, may require the claimants of water from such canal or ditch to pay or secure to be paid in advance before such canal or ditch company, corporation or person owning or operating such ditch or canal can be required to furnish any water from such ditch or canal to any of the users thereof for any purpose. (Sess. Laws 1899, p. 382, sec. 19.) (Shelby v. Farmers' Co-operative Co., 723.)

2. If such canal or ditch company or person fails to require such payment or security therefor, and does furnish any of the users of the waters of such canal or ditch with water for any purpose, the remedy is by suit at law to enforce such payment and not by rule or regulation refusing to furnish water until such arrearages are paid. (Rev. Stats. 1887, sec. 3203.) (Shelby v. Farmers' Co-operative Ditch Co., 723.)

3. A complaint in an action to restrain the maintenance of a checkgate in a community irrigating ditch or lateral that alleges the ownership or possession, use and cultivation of lands under such ditch or lateral; that such ditch or lateral is their only means of water supply; that the maintenance of checkgates conflict with the legal rights of plaintiff and is unlawful—is not demurrable. (Wilson v. Eagleson, 755.)

Bonds—Maps and Plans.

4. Where an irrigation district has been regularly organized, and has had surveys, maps, plans and estimates made in accordance with the requirements of section 15 of the irrigation act (Sess. Laws 1903, p. 165), and a bond issue has been made, and the money raised thereon is not sufficient for the completion of the works planned, it is unnecessary to make a new survey and additional maps and plans as a prerequisite to the ordering and holding another election authorizing a further bond issue for completion of the works. (Pioneer Irr. Dist. v. Campbell, 159.)

See Corporations; Fraud.

JUDGES.

See Courts; Justices of Peace.

JUDGMENTS.

Conclusiveness—Privies.

1. A judgment is conclusive, not only upon those who were parties to the action, but also upon all persons who are in privity with them. (Schuler v. Ford, 739.)

2. A party in possession of land under contract to purchase is not in privity with the party who contracted to sell in the sense that he will be bound by the judgment affecting such property where the action was commenced subsequent to the entering into such contract. (Schuler v. Ford, 739.)

Findings.

3. A judgment will not be reversed on the grounds alone that the findings on which it rests refer to maps and plats on file in the case for a complete and definite description of the property involved in the litigation, but when capable of being made certain by such reference will be sustained. (Murry v. Nixon, 608.)

4. Held, further, that the practice of referring in findings and judgments to extraneous matters for description or other essential matter is not the commendable practice and should be discouraged. (Murry v. Nixon, 608.)

5. Where the court omits to find on all of the material issues, the judgment must be reversed. (Standley v. Flint, 629.)

JURISDICTION.

See Justice of Peace; Venue.

JURY.

1. Where no appeal has been taken from an order of the board of county commissioners in selecting and listing names of persons to serve for the year as jurors under sections 3947 and 3948, Revised Statutes, and no direct attack has been made on grounds of fraud in the selection, the district court is without jurisdiction to quash a panel and discharge a jury on motion of the prosecuting attorney of the county where such motion is not made in any case pending and no litigant is complaining, and neither the commissioners nor the county represented by them are made parties to the proceeding. (Heitman v. Morgan, 562.)

2. For the correction of the improper exercise of such excessive jurisdiction, the writ of *certiorari*, and not *mandamus*, affords the proper relief. (Heitman v. Morgan, 562.)

3. Where it is shown that a letter had been given to a juror during the trial or before a verdict had been returned and the court was ignorant of such fact, and it is further shown that on the hearing of the motion for a new trial the attention of the

JURY (Continued).

court is not called to such fact, it cannot be urged in this court as a ground for new trial. (*State v. Rooke*, 388.)

4. The court may, in its sound discretion, permit the prosecuting attorney to exercise his right of peremptory challenge of a juror at any time previous to the time the jury is sworn to try the case, the object and purpose being to secure a fair and impartial jury. (*State v. Crea*, 88.)

5. Under the provisions of section 7902 of the Revised Statutes it is error to permit, over the objection of the defendant, the jury to take to their juryroom any exhibits except such papers as are specified in said section. (*State v. Crea*, 88.)

See *Mechanic's Lien*.

JUSTICES OF PEACE.***Venue—Jurisdiction—Costs.***

1. Where a defendant on being granted a change of venue refuses to pay the costs of making a transcript of the justice's docket, provided by subdivision 1 of section 4643, Revised Statutes, it is the duty of the justice of the peace to proceed and try the case. (*Presley v. Dean*, 375.)

2. Where a defendant has obtained a change of venue, conditioned upon payment of the costs of a transcript of the docket, and fails to pay such costs, the oral notice of the justice to the attorney of the defendant that he will proceed and try the case at a certain time is sufficient. (*Presley v. Dean*, 375.)

3. Where a justice of the peace has obtained jurisdiction of the person of the defendant, his jurisdiction continues until the action is legally disposed of. (*Presley v. Dean*, 375.)

4. Under the facts of this case, it was the duty of the justice of the peace to proceed and try the case when the defendant refused to pay the costs of the transcript required for a change of venue. (*Presley v. Dean*, 375.)

Service of Summons Outside County—Jurisdiction.

5. Under subdivision 4 of section 4726, Revised Statutes, the objection that the action has been commenced in the wrong county may raise not only a question of law, but one of fact and entitle the defendant to a judgment of nonsuit after the evidence is in, although he does not defend against the action on its merits. (*Purdum v. Neil*, 263.)

6. Where a defendant appears in a justice's court and makes and files his objections to the jurisdiction on the grounds that he resides and was served in another county, and that the contract

JUSTICES OF PEACE (Continued).

sued on was not in writing and was not to be performed in the county where the action was commenced, and at the same time files his affidavit raising those issues and they are denied by the plaintiff's counter-affidavit and facts showing jurisdiction are set up in the counter-affidavit, the objections are properly overruled and the evidence should be heard. (Purdum v. Neil, 263.)

7. If upon the trial it appears that the court has no jurisdiction of the person of the defendant, and of the contract sued on and objection be made on that ground, a nonsuit should be granted under section 4726, Revised Statutes. (Purdum v. Neil, 263.)

See Appeal and Error, 7-10.

LABORER'S LIEN.

See Mechanic's Lien.

LANDLORD AND TENANT.

NOTICE TO PAY RENT OR SURRENDER POSSESSION—OPTION TO TERMINATE LEASE—UNLAWFUL DETAINER—DEFENSES IN UNLAWFUL DETAINER—COUNTERCLAIM—CROSS-COMPLAINT—WHEN EACH AVAILABLE—BREACH OF COVENANT BY LESSOR—IMPLIED COVENANT OF FITNESS OF PREMISES.

1. A notice by the landlord to his tenant under sections 5093 and 5094, Revised Statutes, requiring him to pay rent due or surrender possession, describing the premises and naming the amount due, is a substantial compliance with the statute and is held sufficient. (Hunter v. Porter, 72.)

2. Where the lessor by the terms of a lease reserves to himself an option to *terminate* the lease upon service of a thirty days' notice after breach by the tenant of some covenant thereof, he is not thereby precluded from pursuing his remedy under section 5093, Revised Statutes, in case the tenant fails to pay rent when due. (Hunter v. Porter, 72.)

3. The service of notice and commencement of action under sections 5093 and 5106, Revised Statutes, for failure to pay rent when due, does not primarily terminate or forfeit the lease, but a payment of the rent together with interest, damages found and costs at any time within five days after judgment keeps the lease alive and saves it from forfeiture. (Hunter v. Porter, 72.)

4. Chapter 4 of title 3 of the Code of Civil Procedure, Revised Statutes of 1887, provides a "Summary Proceeding for Obtaining Possession of Real Property," and an action prosecuted thereunder by the landlord for an unlawful detainer by the tenant is not sub-

LANDLORD AND TENANT (Continued).

ject to counterclaim or cross-complaint the same as ordinary actions. (Hunter v. Porter, 72.)

5. In an action for unlawful detainer a claim for unliquidated damages arising out of a breach of a covenant made by the lessor is not a proper matter for counterclaim or cross-action under sections 4184 and 4188, Revised Statutes. (Hunter v. Porter, 72.)

6. Where an agreement of lease refers to the premises demised as a "Cold Storage Building" not merely as a description of the situs but as a designation of its character, and contains a stipulation restricting its use to such articles as are ordinarily required to be stored for preservation, in such a place as is commonly known and designated as a "Cold Storage Building," an implied warranty of fitness for such use and purpose will arise therefrom. (Hunter v. Porter, 72.)

LEASE—LEGAL TITLE TO LIVESTOCK—SALE BY LESSOR—ACCOUNTING—TEMPORARY RESTRAINING ORDER—ALLEGATIONS ON INFORMATION AND BELIEF—UNDERTAKING—DEMURRER—AFFIDAVIT—PRACTICE—REMEDY AT LAW—PARTNERSHIP.

7. Where B. and B. lease certain real estate and personal property consisting of livestock and farming implements to G. for a term of five years, on condition that they shall receive one-half of the grain raised on said premises over and above the amount required to feed such livestock, and one-half of the increase and growth of such livestock or one-half of the price for which the same may be sold, the lessors are entitled to an accounting from the lessee each year for their half of the surplus grain, and are entitled to an accounting for one-half of the proceeds of sales of livestock. (Price v. Grice, 443.)

8. Where a lease for a term of five years provides for the sale of the increase of certain livestock, one-half of the amount received therefor to go to the lessors and one-half to the lessee, the lessors are entitled to receive their one-half thereof whenever such livestock is sold. (Price v. Grice, 443.)

9. Where B. and B., who are mother and son, each owned certain real estate and personal property consisting of livestock and farming implements, joined in a lease to G. leasing to him such real estate and personal property, B. and B. are not necessarily partners, and under the provisions of the lease involved in this action, B. had a right to sell and dispose of the property belonging to him included in said lease and such purchaser would be entitled to all of the rights that said B. had under the terms of said lease. (Price v. Grice, 443.)

LESSOR—LESSEE—COVENANT AGAINST SUBLEASING—TITLE TO REAL ESTATE IN THE UNITED STATES—TECHNICAL ERRORS AND DEFECTS.

10. Where W. makes homestead entry on government land and the entry is contested and before the final termination of the

LANDLORD AND TENANT (Continued).

contest which results in W.'s favor, W. leases a small portion of such land to L. for a term of two years, with covenant against sub-leasing, and thereafter L. transfers his interest to C., and C. through quitclaim deeds from B. and his grantees and successors in interest to such tract of land claims title to such land under said conveyances from B. and his grantees and successors, W. is entitled to judgment against C. and his codefendants, L. and C. (White v. Johnson, 438.)

LARCENY.

1. A demurrer to an information will be overruled when it charges the unlawful and felonious taking of the property from the possession of the owner, naming him, giving a description of the property, fixing time and venue. (State v. Rooke, 388.)

2. When the information charges that the property alleged to have been stolen was the property of C. W. Dunham, the proof shows that Charles Dunham was the owner thereof, and the verdict shows the property to have been that of C. W. Dunham, the variance is not sufficient to warrant a new trial where it does not appear that they are different persons. (State v. Rooke, 388.)

3. Where S. was arrested on a charge of the larceny of a horse, and at the time of his arrest the animal was found in his possession, and the defendant upon his trial showed that he took the horse up in pursuance of an order from one K., who, he supposed, had a right to the possession of the animal, and that he (S.) had never claimed the animal as his own, but had at all times disclaimed ownership and represented that the animal belonged to K., and that he had kept and used the animal in an open and notorious manner, and there is no conflict in any of the material facts proven, the defendant is entitled to his acquittal and a verdict against him should be set aside and a new trial granted. (State v. Seymour, 699.)

LAW OF CASE.

See Appeal and Error, 24.

LEASES.

See Landlord and Tenant; Specific Performance.

LICENSES.**LICENSE TAX—RESTRAINT OF TRADE—INTERSTATE COMMERCE—CONSTITUTIONAL LAW.**

1. Under the provisions of an act providing for the licensing of peddlers, hawkers and solicitors and prescribing penalty for failure, Idaho, Vol. 10—53

LICENSES (Continued).

ure to comply with the provisions of said act, approved March 16, 1901 (Sess. Laws 1901, p. 155), an agent or solicitor for a wholesale merchant, which agent has the goods which he is selling in this state, is required to pay the license tax provided by said act before he can legally do business in this state. (In re D. C. Abel, 288.)

2. The phrase "taking orders," as used in the eighth section of said act, does not contemplate that the runner shall have the goods with him at the time of the sale, but in the common acceptance of the phrase, the agent or runner sells the goods by sample, taking orders therefor, and thereafter delivers the goods. (In re D. C. Abel, 288.)

3. That part of section 8 of said act, by which it is sought to confine the taking of orders for goods sold to merchants only, is clear legislation and in contravention of both federal and state constitutions, but as the remaining part of said act is capable of being enforced in accordance with the legislative intent wholly independent of that provision, that provision is rejected therefrom and the remaining part thereof permitted to stand. (In re D. C. Abel, 288.)

4. That provision of said section 8 referring to peddlers and hawkers in farm products applies to farm products of other states as well as those of the state of Idaho, and is not class legislation, and in no manner interferes with interstate commerce. (In re D. C. Abel, 288.)

CITY ORDINANCE, WHEN VOID—FARMER MAY SELL BEEF IN THE CITY WITHOUT LICENSE.

5. An ordinance by the terms of which a farmer is prohibited from selling the products of his farm, with the exception of milk, fish and game, without first taking out a license from the city, is in violation of section 8 of an act entitled "An act to repeal section 1651 of the Revised Statutes of the state of Idaho and to provide for the licensing of peddlers, hawkers and solicitors, and prescribing penalties for failure to comply with the provisions of this act." (Sess. Laws 1901, p. 56.) (In re Snyder, 682.)

6. Beef from slaughtered animals raised and slaughtered on the farm is the product of the farm, and may be sold within the corporate limits of cities of this state without license. (In re Snyder, 682.)

LIENS.

LIEN ON PERSONAL PROPERTY FOR CARE THEREOF—TENANTS IN COMMON OF PERSONAL PROPERTY—INJUNCTION PENDING DETERMINATION OF AN ACTION FOR DAMAGES.

1. One who renders services in the care and protection of personal property is, under the provisions of section 3445, Revised

LIENS (Continued).

Statutes, as amended by act of February 9, 1899 (Sess. Laws 1899, p. 181), entitled to a lien on such property, dependent on possession, for his pay therefor. (Williamson v. Moore, 749.)

2. Two of three tenants in common in possession of personal property may lawfully manage and control the same and their employment of another person to care for and protect the property will entitle such person to a lien thereon dependent on possession, for his pay for such services. (Williamson v. Moore, 749.)

See Mechanic's Lien.

LIMITATION OF ACTIONS.

See Adverse Possession; State.

LIVESTOCK.

See Animals.

LOST INSTRUMENTS.

See Habeas Corpus.

MANDAMUS.

NONSUIT—WRIT OF MANDATE—CAUSE REMANDED FOR A NEW TRIAL—DISMISSED ON OPENING STATEMENT OF COUNSEL FOR PLAINTIFFS TO JURY—WRIT ISSUED REQUIRING JUDGE TO RETRY THE ACTION.

At the close of plaintiff's evidence, court granted motion for nonsuit and entered judgment of dismissal from which an appeal was taken. It was held on appeal that plaintiffs had made a *prima facie* case and cause was remanded for a new trial. Cause came on for retrial before court with jury, and after counsel for plaintiff had made his opening statement to jury the court sustained a motion to dismiss the action and entered judgment of dismissal. Thereupon a writ of mandate was prayed for to require court to proceed to try said action as directed by decision of appellate court. *Held*, that the writ should issue. (Kroetch v. Morgan, 172.)

See Jury, 2.

MARRIED WOMEN.

See Acknowledgments; Homesteads; Husband and Wife.

MEANDER LINES.

See Boundaries.

MECHANIC'S LIEN.

COMPLAINT—WHAT SHOULD CONTAIN IN FORECLOSURE OF LABORERS' LIENS—CONFLICTING EVIDENCE IN EQUITY CASES—JUDGMENT SHOULD DESCRIBE LAND TO BE SOLD—WHAT THE NOTICE OF LIEN SHOULD CONTAIN—APPLICATION FOR CONTINUANCE—FEES IN MECHANIC'S LIEN CASES.

1. A complaint for the foreclosure of a laborer's lien that sufficiently describes the property, fixes the time and manner of labor, the amount due, and that the lien was filed within the statutory time together with necessary requirements in ordinary suits in equity is sufficient. (*Robertson v. Moore*, 115.)

2. By the provisions of the Session Laws of 1899, being termed an act to secure liens for mechanics, laborers, materialmen and other persons, found on page 147, section 4 requires the trial court to ascertain the amount of land necessary for the convenient use of the property to be sold, and it is error not to do so. (*Robertson v. Moore*, 115.)

3. The notice of lien should contain a statement of the demand; the name of the owner or reputed owner if known; the name of the person by whom employed; a description of the property, which claim must be verified. (*Robertson v. Moore*, 115.)

4. Attorneys' fees are allowed in the foreclosure of mechanics' and laborers' liens. (*Robertson v. Moore*, 115.)

5. In an action to enforce a mechanic's or laborer's lien where it is shown by counterclaim or cross-complaint that there is a demand for affirmative relief, either party is entitled to a jury trial on that issue, if it is in the nature of an action at law. (*Robertson v. Moore*, 115.)

MINES AND MINING.

GRUBSTAKE AGREEMENT—MINING CLAIMS—ACTION TO DECLARE LOCATOR TRUSTEE—WEIGHT OF EVIDENCE—EXCEPTION FROM GENERAL RULE.

1. The rule which has been adopted and followed by courts of equity requiring a plaintiff who seeks to establish a trust in real property contrary to the express terms of the deed which vested title in another to make out his case "clearly and satisfactorily beyond a reasonable doubt," does not find the same reason for its application in a case where a party to a "grubstake" agreement invokes the aid of a court of equity in establishing a trust in mining claims located on the public domain by one of the parties to such agreement. (*Morrow v. Matthew*, 423.)

2. *Id.*—A location notice is not an instrument of like solemnity and dignity as sealed instruments at common law, and in cases seeking to establish a trust is not entitled to protection under

MINES AND MINING (Continued).

the same rules applicable to sealed instruments. (*Morrow v. Matthew*, 423.)

3. The courts will not refuse to enforce a "grubstake" agreement simply because a complainant cannot produce that great preponderance of evidence which produces a moral certainty and precludes all reasonable doubt. (*Morrow v. Matthew*, 423.)

MORTGAGES.

1. Under the facts of this case it is held that the plaintiff, appellant here, is estopped to deny the authority of the mortgagee, the Bunnell & Eno Investment Company, to collect the debt and release and discharge the security. (*Pennypacker v. Latimer*, 625.)

2. Where B. executed a mortgage to the B. & E. Investment Company, and the company thereafter assigned the same to P., with a contract binding the company to pay interest installments and principal promptly when due, and agreeing not to foreclose the mortgage for two years after the same became due, and giving the company the right to repurchase said note and mortgage at any time, and collected nine interest installments covering a period of about five years through said company, and delivered the coupons therefor to the mortgagor through said corporation, and neglected to file its assignment of said mortgage for record in the proper county, and failed and neglected to notify the mortgagors of such assignment, *held*, that under those facts the said B. & E. Investment Company was the agent of P., and that the payment of said principal debt and interest to the B. & E. Investment Company was a payment to P. (*Pennypacker v. Latimer*, 618.)

3. Necessity for recording assignment of mortgage in order to hold the purchaser of the mortgaged realty liable to the assignee after such purchaser has procured a release and satisfaction from the mortgagee, *quære*. (*Pennypacker v. Latimer*, 625.)

4. An action may be maintained in the district court for the foreclosure of a mortgage upon real estate where the mortgagor is deceased, although the debt secured by the mortgage has been presented as a claim to the administrator and allowed by him and also by the probate judge of the county, where the only object of the action is to make the debt out of the mortgaged property, and the creditor waives all recourse against any other property of the estate of the deceased. (*First Nat. Bank of Hailey v. Glenn*, 244.)

See Acknowledgments; Chattel Mortgages; Executors and Administrators; Usury, 6.

MUNICIPAL CORPORATIONS.

REAL ESTATE—TITLE BY ADVERSE POSSESSION—TAXATION BY CITY—ESTOPPEL.

1. Where the city erected a fire-engine house on its own lot and on a small fraction of an adjoining lot, and maintained such house there for about twenty years, and in the meantime assessed for taxation said fractional part of the adjoining lot with the remaining part thereof to the owner, and collected and received such taxes and charges for street paving, sidewalk, sprinkling and other city purposes, it is estopped from claiming title thereto by adverse possession. (*Hesse v. Strode*, 250.)

CITY OR VILLAGE ORDINANCE—TITLE—SUFFICIENCY OF.

2. The title to an ordinance of a city or village in this state, to wit, "An ordinance regulating and licensing liquor dealers within the village of St. Anthony," is sufficient where the ordinance provides for the payment of a fixed sum for retail liquor dealers only, and prohibits the business of running a restaurant or lunch counter in connection therewith or in the same room, and also requires the doors to be closed on Sunday, and also prohibits music, singing and dancing in the room occupied as a saloon. (*Village of St. Anthony v. Brandon*, 205.)

ORDINANCES OF CITIES UNCONSTITUTIONAL WHEN—MAY PROHIBIT WOMEN FROM ENTERING SALOONS FOR IMMORAL PURPOSES—REASONABLENESS OF FINE FOR VIOLATION.

3. An ordinance that provides: "It shall be unlawful for any person maintaining any saloon, barroom or drinking-shop, or any apartment thereto attached, to permit females to enter their said place of business," is unconstitutional. (*State v. Nelson*, 522.)

4. A city may by ordinance prohibit females from entering places where intoxicating liquors are sold for immoral purposes. (*State v. Nelson*, 522.)

5. An ordinance that provides a punishment by fine of not less than \$25 nor more than \$200, or by imprisonment in the city jail for not less than ten days nor more than sixty days for violation of an ordinance that prohibits females from entering their places of business for immoral purposes, is not void or unconstitutional, for the reason that it is unreasonable or oppressive. (*State v. Nelson*, 522.)

NATIONAL BANKS.

See Injunctions, 13, 14.

NONSUIT.

See Dismissal and Nonsuit.

NOTARIES.

See Acknowledgments.

NUISANCES.

1. An action may be maintained by a private citizen to restrain the construction of a nuisance in the navigable streams of this state, under the provisions of section 3633, Revised Statutes. (Small v. Harrington, 499.)

2. The trial and acquittal of a party charged with the construction of a nuisance in a navigable stream of this state by a jury in justice's court is no bar to a civil action to restrain the completion of the alleged nuisance. (Small v. Harrington, 499.)

ORDINANCES.

See Municipal Corporations.

PAROL EVIDENCE.

See Deeds.

PARTITION.

In a suit for the partition of real estate among several parties, if it appears to the court that it is impracticable or inconvenient to make a complete partition in the first instance among all the parties to the suit, the court may direct a partition among two or more of the parties and from time to time thereafter may determine as to the other's rights, shares and interests, and render a further judgment directing a partition, in like manner, of all the undetermined parts and portions of the property. (Richardson v. Ruddy, 151.)

PATENTS.

See Boundaries.

PEDDLERS.

See Licenses.

PENITENTIARIES.

See Prisons.

PLEADING.

In General.

1. Under the provisions of our Code of Civil Procedure, the technicalities of pleading (under the common law) have been dis-

PLEADING (Continued).

pensed with, and the plaintiff need only state his cause of action in ordinary and concise language, whether it be in *assumpsit*, trespass or ejectment, without regard to the ancient forms of pleading, and the plaintiff can be sent out of court only when upon his facts he is entitled to no relief, either at law or in equity. (Rauh v. Oliver, 3.)

2. Under the provisions of section 4231, Revised Statutes, the court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect. (White v. Johnson, 438.)

3. *Held*, that the complaint states a cause of action. (Spotswood v. Morris, 129.)

Different Counts for Single Claim.

4. In an action to recover commission for the sale of real estate under circumstances where the exact legal nature of plaintiff's right and defendant's liability depends upon facts within the peculiar knowledge of the defendant the plaintiff may set forth the same single cause of action in several counts and with different averments so as to meet the possible proofs which will appear on the trial. In other words, when a plaintiff has two or more distinct and separate reasons for the right to the relief he asks, or when there is some uncertainty as to the ground of recovery, the complaint may set forth a single claim in several distinct counts. (Spotswood v. Morris, 129.)

Cross-complaint.

5. A cross-complaint under section 4188, Revised Statutes, must relate to or depend upon the contract or transaction on which the main case is founded or affect the property to which the action relates, but does not necessarily seek its relief against all or any of the original plaintiffs or defendants. (Hunter v. Porter, 72.)

Amendments.

6. In furtherance of justice, amendments of pleadings should be liberally allowed. *Held*, that the court did not abuse its discretion in refusing to allow an amendment or in refusing to allow the defendant to file a cross-complaint asking affirmative relief under the facts of this case. (Kindall v. Lincoln Hardware etc. Co., 13.)

7. Amendments to pleadings at any stage of the proceedings are largely within the sound discretion of the trial court. (Small v. Harrington, 499.)

PLEADING (Continued).**Variance.**

8. No variance between the allegations and the proof is deemed to be material unless it had actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. (*Lewis v. Utah Construction Co.*, 214.)

See Election of Remedies.

PRELIMINARY EXAMINATION.

See Habeas Corpus; Indictment and Information.

PRISONS.**BOARD OF STATE PRISON COMMISSIONERS—ACTION BY MAJORITY OF MEMBERS—NOTICE OF MEETING.**

1. The board of state prison commissioners as created by section 5 of article 10 of the constitution is granted the "control, direction and management of the penitentiaries of the state," and under such grant of power and authority they may meet at such times as they deem necessary. (*Ackley v. Perrin*, 531.)

2. A majority of the officers constituting such board may hold a meeting and transact such business as the board is authorized to transact. (*Ackley v. Perrin*, 531.)

3. A meeting of the state prison commissioners can be lawfully held by a majority of the board without giving notice to a member of the board who is at the time of calling and holding the meeting beyond the jurisdiction of the state. (*Ackley v. Perrin*, 531.)

PROBATE COURTS.

See Appeal and Error, 7-10; Courts; Executors and Administrators.

PUBLIC LANDS.

1. The power of Congress over the public lands is plenary so long as title thereto remains in the government, and no right of property therein has vested in another. (*Oregon Short Line R. R. Co. v. Quigley*, 770.)

2. No right of property, as against the government, vests in a settler on public lands until he has complied with all the prerequisites for acquiring title and paid the purchase money. (*Oregon Short Line R. R. Co. v. Quigley*, 770.)

See Boundaries; Railroads.

QUIETING TITLE.

1. Where it is shown that the action is to quiet title to land which is a part of the public domain, that the plaintiff or his

QUIETING TITLE (Continued).

predecessor in interest have never occupied the land or filed a possessory claim to such land, as provided in section 4552, Revised Statutes, it cannot be maintained. (*Branca v. Ferrin*, 239.)

2. Where it is shown that the plaintiff in the action neither in person nor by his predecessor in interest ever filed a possessory claim on land to which he seeks to quiet the title, nor was never in possession thereof, it is error to admit the record of the foreclosure proceedings through which he claims title when the defendant is in the possession of the premises. (*Branca v. Ferrin*, 239.)

3. Under section 4538, Revised Statutes, an action may be maintained to quiet the title to any interest or estate a person may have in lands of which the law takes cognizance. (*Johnson v. Hurst*, 308.)

4. Where an action is brought in the district court by the party actually in possession of the property in controversy, for the purpose of quieting title to his leasehold estate, under the provisions of section 4538, Revised Statutes, it is a suit in equity, and neither party, as a matter of right, is entitled to a jury. (*Shields v. Johnson*, 476.)

5. Complaint in this case examined and held sufficient to state a cause of action; and no defect therein having been pointed out by demurrer in the lower court, any defect in the manner of stating the cause of action will not be examined on first suggestion in this court. (*Murray v. Nixon*, 608.)

RAILROADS.***Right of Way Over Public Lands.***

1. Act of Congress of March 3, 1873, granting a right of way to the Utah and Northern Railway Company, and requiring the filing of a map of definite location with the Secretary of the Interior, is substantially complied with, so far as settlers are concerned, by the actual construction and operation of the road. (*Oregon Short Line R. R. Co. v. Quigley*, 770.)

2. The grant for right of way became definitely fixed by the actual construction of the road as effectually as it could have been by the filing of a map of location. (*Oregon Short Line R. R. Co. v. Quigley*, 770.)

3. The grant by Congress of a right of way one hundred feet wide on each side of the central line of the track was a conclusive determination of the reasonable and necessary quantity of land to be dedicated to such use, and carried with it the right of possession to the whole of such grant. (*Oregon Short Line R. R. Co. v. Quigley*, 770.)

RAILROADS (Continued).

4. The grant by Congress of a right of way is not an absolute fee for all purposes, but is in the nature of a conditional grant and limited to use and occupation for railway purposes. The franchise and right of way are inseparably attached to each other. (Oregon Short Line R. R. Co. v. Quigley, 770.)

5. The company could not by its grant convey any part of the right of way in such manner or for such purpose as would sever the right of possession from the franchise to operate and maintain a railway line thereon. (Oregon Short Line R. R. Co. v. Quigley, 770.)

Adverse Possession of Right of Way.

6. It therefore follows that adverse possession cannot ripen into a right which would divert the use and occupation of such right of way from that to which Congress made the dedication. (Oregon Short Line R. R. Co. v. Quigley, 770.)

7. The statute of limitations will not run against an action to maintain the integrity of the right of way granted by Congress for a specific use and purpose. (Oregon Short Line R. R. Co. v. Quigley, 770.)

RAPE.

1. The general rule in criminal cases is that where one specific offense is charged, the commission of other offenses cannot be proven for the purpose of showing that the defendant would have been more likely to have committed the offense for which he was on trial, nor as corroborating the testimony relating thereto. But there are some exceptions to this general rule, and where the offense consists of rape upon a female under the age of consent, evidence of previous acts occurring prior to the offense alleged is admissible as having a tendency to render it more probable that the crime charged was committed, though evidence of such crimes would be inadmissible as independent testimony. (State v. Lancaster, 410.)

2. The proof of other rapes on the prosecutrix than the one charged in the information is not admissible for the purpose of proving this distinct offense, but to show the relation and the familiarity of the parties and as corroborative of the prosecutrix's testimony concerning the particular act relied upon for a conviction. (State v. Lancaster, 410.)

3. In this class of cases where several crimes of the same kind may be proved, the state must elect on what particular offense it will stand, and the jury must be informed for what offense a conviction is demanded. (State v. Lancaster, 410.)

4. Statements made to another party by the person alleged to have been assaulted and raped, and not in the presence of the

RAPE (Continued).

defendant, are not admissible, unless it be shown that it was so closely interwoven with the transaction that it becomes a part of the *res gestae*. (State v. Harness, 18.)

See Criminal Law, 10.

RECORDS.

See Mortgages, 2, 3.

REFEREES.

Under the provisions of section 4493, Annotated Code of Civil Procedure (Sess. Laws 1901, p. 132), the court or judge has authority to appoint a referee to take the testimony in the action where the parties are numerous and the convenience of the witnesses and the ends of justice would be promoted thereby. (Boise Irr. etc. Co. v. Stewart, 38.)

RENTS.

See Landlord and Tenant.

REPLEVIN.

In an action in claim and delivery the main issue is the right to the possession of the personal property in dispute. (Cunningham v. Stoner, 549.)

REPUTATION.

See Criminal Law, 4.

RES GESTAE.

See Rape, 4.

RES JUDICATA.

See Judgments, 1, 2.

ROAD DISTRICT CONTRACTS.

See Counties.

SALES.**SALE OF PERSONAL PROPERTY—DELIVERY AND POSSESSION.**

1. A sale of personal property is attacked as fraudulent under the provisions of section 3021, Revised Statutes of Idaho, 1887, on the grounds that it was not accompanied by an immediate delivery

SALES (Continued).

and followed by an actual and continued change of possession of the property transferred. Evidence examined and *held* that it is sufficient to support the findings and judgment of the court below. (*Rapple v. Hughes*, 338.)

2. The determination as to what constitutes immediate change and delivery and actual possession is purely a question of fact to be determined by the jury, or the court in case a jury is waived, from all the evidence in each particular case, following *Simons v. Daly*, 9 Idaho, 87, 72 Pac. 507. (*Rapple v. Hughes*, 338.)

SCHOOLS AND TEACHERS.**TEACHER'S CONTRACT—POWER OF TRUSTEES TO DISMISS TEACHER—DISCRETION OF TRUSTEES.**

1. A contract between a teacher and a school district wherein E. is designated as party of the first part, and "The Board of Trustees of School District No. 8," etc., designated as the party of the second part, and the contract is signed by E. and the individual members of the school board whose names are followed by the further subscription: "The Board of Trustees of School District No. 8, in and for the County of Shoshone, State of Idaho," it is held to be a sufficient compliance with section 34 of the school act (Sess. Laws 1899, p. 92) to constitute such agreement the contract of the school district and enforceable as such. (*Ewin v. Independent School Dist. No. 8*, 102.)

2. Under section 45 of the school law which authorizes a board of trustees to discharge a teacher "for neglect of duty, or any cause that, in their opinion, renders the services of such teacher unprofitable to the district," but requires that "no teacher shall be discharged before the end of his term without a reasonable hearing," *held*, that before such a teacher can be removed he must have notice and an opportunity to be heard. (*Ewin v. Independent School Dist. No. 8*, 102.)

3. Under section 84 of same act, which empowers the board of trustees of an independent school district "to employ or discharge teachers" without specifying any cause or requiring any notice to the teacher, such board has unlimited and unrestricted power to dismiss either with or without notice to the teacher, and the exercise of such discretion by the board is not subject to review or control by the courts. (*Ewin v. Independent School Dist. No. 8*, 102.)

SELF-DEFENSE.

See Homicide.

SENTENCE.

See Criminal Law, 10.

SETOFF AND COUNTERCLAIM.

A counterclaim, while it must exist in favor of the defendant and against the plaintiff, may, in other respects, go further than a cross-complaint, and, if the cause of action arose on contract may set forth any other cause of action arising on a contract as a counterclaim thereto. (Hunter v. Porter, 72.)

See Landlord and Tenant, 5.

SIGNATURES.

See Acknowledgments.

SPECIFIC PERFORMANCE.

1. Where the specific performance of an oral contract to lease real estate for a term of more than one year is sought to be enforced, the parol agreement must be clearly proved to the satisfaction of the court. (Deeds v. Stephens, 332.)

2. A receipt or memorandum in the following language: "Lowe, Idaho, March 17, 1902. Received from S. C. Kurdy, one hundred and ninety dollars on land, Sec. 25, Ts. 32 R. 2 E. 160 acres," signed by the parties sought to be charged, *held* insufficient upon which to enforce specific performance. (Kurdy v. Rogers, 416.)

3. Where it is shown by the complaint, which is not denied, that by written contract T. agreed to furnish R. at a place named in the contract two thousand five hundred cords of wood, R. to furnish all money necessary to chop, haul, boom and deliver such wood; that in pursuance of such contract R. did, at all times, comply with all the terms and conditions of the contract; that after the delivery of two hundred and fifty cords of wood by the administratrix of the estate of T. and after such administratrix had agreed to carry out the terms and conditions of such contract, she refused to further comply with the contract unless R. would release five hundred cords of such wood from delivery to R., he having furnished her large sums of money to complete the contract of T., *held*, that a decree for specific performance will be enforced in a court of equity. (Ridenbaugh v. Thayer, 662.)

STARE DECISIS.

See Appeal and Error, 24.

STATE.

CLAIM AGAINST STATE—LIMITATIONS.

Where one holds a claim against the state and does not make application to this court for a recommendatory decision under the provisions of section 10, article 5 of the state constitution, for nine or ten years after the claim becomes due, this court is not

STATE (Continued).

authorized to hear the claim and recommend the payment thereof to the legislature. Said claim is barred by the statute of limitations. (Small v. State, 1.)

STATEMENT ON APPEAL.

See Appeal and Error, 20.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.**STATUTORY CONSTRUCTION—LOCAL LAW.**

1. Statutes will be construed with a view to ascertain the intent of the law-making power and to give force and meaning to the language used. (Idaho Mut. etc. Ins. Co. v. Myer, 294.)

2. A statute that deals exclusively with one subject and repeals all acts and parts of acts in conflict with it will be construed to have been intended to cover all subjects and matters of the new act. (Idaho Mut. etc. Ins. Co. v. Myer, 294.)

See Corporations; Fraud.

SUMMONS.

See Justice of Peace.

SURVEYS.

See Boundaries.

TAXATION.

Act of March 5, 1901 (Sess. Laws 1901, 78), "providing for a special property road tax, and defining the duties of officers in the levy and collection thereof," is not in conflict with the last clause of section 5, article 7 of the constitution, which provides that "duplicate taxation of property for the same purpose during the same year is hereby prohibited," where all the taxable property of the county is required to respond to such levy, notwithstanding a general tax levy is made for the same year for road purposes. (Humbird Lumber Co. v. Kootenai Co., 490.)

See Commerce; Licenses.

TEACHERS.

See Schools.

TELEPHONE COMMUNICATIONS

See Evidence, 2, 3.

TENANTS IN COMMON.

See Liens.

TITLE OF STATUTE.

See Municipal Corporations, 2; Waters and Watercourses, 1.

TRESPASS.

See Injunctions, 11.

TRIAL.

See Continuances; Criminal Law; Dismissal and Nonsuit; Jury; Witnesses.

UNLAWFUL DETAINER.

See Landlord and Tenant.

USURY.**PLEA OF USURY—OPTION TO PAY BEFORE MATURITY—ESTOPPEL.**

1. A contract whereby a loan is to be paid in a fixed number of monthly installments of \$13 interest and \$9.75 principal, and the aggregate amount of interest to be thus paid falls within the terms of the usury statute (Rev. Stats., sec. 1226), will not be relieved from the operation of such statute by reason of the fact that the contract reserves to the borrower an option to pay the entire debt at any time, and the earliest interest installments, prior to a reduction of the principal, fall within the legal rate of interest which may be charged. (Ford v. Washington National Bldg. etc. Assn., 30.)

2. In such case the subject of inquiry is whether or not the contract provides, either directly or indirectly, for the payment of a greater rate of interest than authorized by law. (Ford v. Washington National Bldg. etc. Assn., 30.)

3. The defense of usury may be pleaded by anyone claiming under and in privity with the borrower. (Ford v. Washington National Bldg. etc. Assn., 30.)

USURY (Continued).

4. The doctrine of estoppel may not be invoked to defeat the plea of usury when interposed by any person otherwise legally entitled to interpose such plea. (*Ford v. Washington National Bldg. etc. Assn.*, 30.)

5. *Anderson v. Oregon Mtg. Co.*, 8 Idaho, 418, 69 Pac. 130, distinguished and held not decisive of the questions raised in this case. (*Ford v. Washington National Bldg. etc. Assn.*, 30.)

6. Where a mortgage provided that a debt should draw interest at the highest legal rate permissible at the time of the execution thereof, and in addition thereto provided that the debtor should pay the taxes on the mortgage and debt secured thereby, *held*, that such stipulation for the payment of taxes on the loan did not taint the contract with usury; since section 1425, Revised Statutes, provided that "Every contract by which a debtor agrees to pay any tax or assessment on money loaned, or any mortgage, deed of trust, or other lien, shall as to such tax or assessment, be null and void." (*First Nat. Bank of Hailey v. Glenn*, 224.)

VARIANCE.

See Pleading, 8.

VENDOR AND VENDEE.

1. As a general rule of law, the grantee named in a deed of conveyance is not estopped to deny the title of his grantor. (*Oregon Short Line R. R. Co. v. Quigley*, 770.)

2. The estoppel exists only where there is an obligation to restore the possession in some event or upon some contingency. (*Oregon Short Line R. R. Co. v. Quigley*, 770.)

See Boundaries; Injunction, 10; Judgments, 2; Specific Performance.

VENUE.

An application for change of venue will be denied when it is based on the ground of the bias and prejudice of the people of the county, where it is shown that an equal number of the citizens of the county testify that in their opinion a fair and impartial trial can be had in the county. (*State v. Rooke*, 388.)

See Justice of Peace.

WATERS AND WATERCOURSES.

CONSTITUTIONAL LAW—TITLE TO ACT—PUBLIC WATERS—REGULATION OF APPROPRIATION—OWNERSHIP IN WATER—LOCAL AND SPECIAL LAWS—STATE ENGINEER—HOW PAID—COSTS OF MAPS AND PLATS—JUDGE MAY REQUEST STATE ENGINEER TO FURNISH MAPS AND
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WATERS AND WATERCOURSES (Continued).

PLATS—DISCRETIONARY—REGULATING PROCEDURE—NO PERSON HAS VESTED RIGHT IN PROCEDURE—RETROSPECTIVE LAW—EVIDENCE IN WATER SUIT—APPOINTMENT OF REFEREE TO TAKE TESTIMONY.

1. The title to an act entitled "An act to regulate the appropriation and diversion of the public waters and to establish rights to the use of said waters and the priority of such rights," approved March 11, 1903 (Sess. Laws, 1903, p. 223), *held* sufficient to include all of the provisions of said act particularly referred to in this proceeding and not repugnant to the provisions of section 16, article 3, of the constitution of Idaho. (Boise Irr. etc. Co. v. Stewart, 38.)

2. The term "public waters" as used in said act refers to all water running in the natural channel of the streams, and the state may by proper legislation regulate the appropriation and use thereof. (Boise Irr. etc. Co. v. Stewart, 38.)

3. The private rights to the use of such waters are rights to use the same, and not an ownership of them while they are flowing in the natural channel of the streams. (Boise Irr. etc. Co. v. Stewart, 38.)

4. The title of said act is sufficient to include provisions for the appropriation of such waters and the settlement of the priorities of rights to the use thereof. (Boise Irr. etc. Co. v. Stewart, 38.)

5. The provisions of sections 4 and 5 of said act are not repugnant to the provisions of section 2 of article 5 of the state constitution. (Boise Irr. etc. Co. v. Stewart, 38.)

6. Said act is not a local or special law within the meaning of subdivision 3 of section 19 of the state constitution, and is not repugnant to sections 2 and 26 of article 5 of the constitution. (Boise Irr. etc. Co. v. Stewart, 38.)

7. The work required to be done by the state engineer under the provisions of section 33 of said act must be paid for by the state, and that done under the provisions of section 37 must be paid for by parties to the action. (Boise Irr. etc. Co. v. Stewart, 38.)

8. In an action to determine the rights and priorities to the use of water when the defendants file cross-complaints and ask for affirmative relief, the awarding of costs is in the sound discretion of the court. (Boise Irr. etc. Co. v. Stewart, 38.)

9. Under the provisions of said section 37 the state engineer is only entitled to recover his actual and necessary costs for the work performed by him, and any party to the action may contest his right to recover the amount claimed by him and the court should only allow his actual and necessary costs. (Boise Irr. etc. Co. v. Stewart, 38.)

WATERS AND WATERCOURSES (Continued).

10. That provision of said section which provides that the "judge of such court shall request the state engineer to make, etc.," is directory and not mandatory, and that matter is left in the sound legal discretion of the judge. (*Boise Irr. etc. Co. v. Stewart*, 38.)

11. The state has the right to prescribe reasonable rules and regulations, whereby the rights and priorities of appropriators to the use of water may be settled and to require them to pay the necessary costs incurred therein. (*Boise Irr. etc. Co. v. Stewart*, 38.)

12. If it is shown that such maps and plats are incorrect in any material particular as to the rights of any of the parties to the suit, the state engineer is not entitled to recover such party's *pro rata* share of the cost of preparing the same. (*Boise Irr. etc. Co. v. Stewart*, 38.)

13. The legislature has authority to provide by statute that the statements, maps and plats referred to in section 37 of said act should be accepted as evidence on the trial of actions to establish rights to the use of water and the priority of such rights. (*Boise Irr. etc. Co. v. Stewart*, 38.)

WATER RIGHTS—NATURAL RESERVOIRS—DIVERSION OF WATERS—INJUNCTIVE RELIEF.

14. Evidence of expert and nonexpert witnesses with reference to the theory of the formation of a natural reservoir along the course of a stream examined, and held insufficient to justify a court in departing from the uniform and well-established doctrine, that the first appropriator has the first right; and in this case the position of appellants that their diversion and use of the water is not injurious or prejudicial to the rights of a prior appropriator lower down the stream is held untenable. (*Moe v. Harger*, 302.)

15. So soon as the prior appropriation and right of use is established, it is clear, as a proposition of law, that such appropriator is entitled to have sufficient of the unappropriated waters flow down to his point of diversion to supply his right, and an injunction against interference therewith is proper protective relief to be granted. (*Moe v. Harger*, 302.)

See *Boundaries; Irrigation and Ditch Companies.*

WITNESSES.***Swearing in a Body.***

1. It is not error for the court to permit the witnesses to be sworn in a body. (*State v. Crea*, 88.)

2. It is not error to swear all witnesses in a body at the beginning of the trial. (*State v. Rooke*, 388.)

WITNESSES (Continued).*Competency.*

3. As this is not an action prosecuted against an executor or administrator upon a claim or demand against the estate of a deceased person, the plaintiff is not precluded from testifying as a witness in his own behalf under the provisions of subdivision 3, section 5957, Revised Statutes. (Cunningham v. Stoner, 549.)

4. It is error to refuse to require the husband of the alleged injured party to testify whether he discovered marks or bruises on the person of the wife, when other witnesses had testified to certain marks and bruises. (State v. Harness, 18.)

Impeachment.

5. Under the provisions of section 6063, Revised Statutes, a witness may be impeached by evidence showing that he has made at other times statements inconsistent with his present testimony, and such statements must not only be relevant to the issue, but must be of matters of fact and not simply the opinion of the witness based on facts. (State v. Crea, 88.)

6. It is error to reject any evidence showing or tending to show the bias or prejudice of the witness either for or against the defendant. (State v. Crea, 88.)

See Costs; Evidence.

See E. & H.
L. & H.

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